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LECTURES

ON THE

STUDY AND PRACTICE OF THE LAW.

LECTURES
ON THE
STUDY AND PRACTICE
OF
THE LAW,

DELIVERED IN THE LAW SCHOOL OF HARVARD UNIVERSITY

BY
EMORY WASHBURN, LL.D.,

BUSSEY PROFESSOR OF LAW.

FOURTH EDITION.

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CAMBRIDGE:
PRESS OF JOHN WILSON AND SON.

The following errata have been detected since the first issue of these Lectures, viz. :—

Page 141. The word “grant” in a deed of conveyance, in Iowa, is no longer held to imply a covenant.

Page 160. The verdict in the case of Freeman, the negro referred to, was against the prisoner ; but the judgment was reversed. See 4 Denio, 9.

Page 168. A *prochein ami* is not liable for costs, in several of the States, when acting for an infant plaintiff.

CAMBRIDGE:
PRESS OF JOHN WILSON AND SON.

TO THE
ALUMNI OF HARVARD LAW SCHOOL,

WHO, BY THEIR EXAMPLE,

HAVE EVINCED THE TRUTH OF THE SENTIMENTS INTENDED TO BE
HEREIN ILLUSTRATED,

THIS LITTLE VOLUME IS CORDIALLY INSCRIBED

PREFACE.

THE title of this volume explains the purposes at which it aims. Without claiming for it either wisdom or sound learning, the author has endeavored to turn to account the results of his own observation and reflection, for the benefit of young men engaged in the study of the law, or just entering upon its practice. He has been encouraged to do this by the interest which he has so often heard expressed, by such of them as he has been associated with in his connection with the Harvard Law School, to know something more of the inner life of the profession they had chosen than could be learned from the text-books within their reach.

Looking forward to the time when they were to take their places in the Bar, they have shown a strong desire to know the processes by which they were to achieve the success which it was their ambition to deserve. To this end they have desired to be told what and how to study, and what were to be the duties and privileges for which they were to prepare themselves, when they should have passed beyond the condition of pupilage to that of counsellors and advocates. And the deep attention with which they have listened to what has fallen from older and more experienced members of the profession,

in the way of offering motives and inducements to exertion on the part of the student, has supplied the hint on which the author was first led to address some thoughts upon the subject to the school, in the form of an extra course of Lectures. This was done without any intention of giving them any further publicity than the lecture-room; and he has only been induced to offer them in the present form by the urgent request of those who had listened to them from the desk.

In yielding to this request, however, the writer neither intends to become a moral censor, nor claims to be a guide or teacher beyond the lessons of his own experience and observation. If he has dwelt somewhat at length upon the importance, to the student and the practitioner, of cultivating good and useful habits, and the duty which the profession owes to the age in the matter of a sound public sentiment, as well as upon the fearlessness and good faith with which a lawyer should guard the trusts which are committed to his charge, he has, in so doing, only been carrying out, in form, an expression of that profound conviction which he has been taught, by long observation, to entertain of the true character and dignity of a calling which is associated with all that gives property its value, life its security, and society its peace and prosperity.

EMORY WASHBURN.

CAMBRIDGE, July, 1871

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STUDY AND PRACTICE OF LAW.

LECTURE I.

STUDY.

1. What is meant by Study and Practice. — 2. Processes of Education. — 3. Professional Education. — 4. Means and Ends of Legal Education. — 5. Difficulties in reducing Study to a System. — 6. What to study and understand. — 7. Text-books. — 8. Learning Practice.

IN attempting to comply with your request, — that I should put into the form of lectures some of the hints and suggestions upon the *study* and *practice* of the law which have resulted from the experience and observation of a pretty long association with the bar, — I ought to apprise you, in all frankness, that you are not to expect any attempt, on my part, to borrow from stores of technical learning. My purpose will be rather to consider how a student may acquire and use learning, than to point out or exhibit what that learning is which lies at the foundation of professional eminence and success.

1. By *study*, as I understand the term, I intend the processes of education by which a student develops and cultivates his powers of acquiring knowledge, at the same time that he learns how he can best apply it to practical purposes ; limiting our

inquiry, however, to its bearing upon a preparation for his profession. And by *practice* I intend whatever is embraced in the proper business of an attorney and counsellor-at-law ; including the preparation and conduct of a case in court, the giving of professional counsel and advice, and the observance of the rules and proprieties of professional intercourse and deportment, together with the relation which a lawyer holds to the public.

In this outline of the subjects of which I propose to treat, you have, substantially, the order in which it seems proper to consider them. But it fails to convey any idea of the extent to which they necessarily divide themselves, if we follow them out into any thing like detail.

2. The subject of education in the abstract, in itself, opens a very broad inquiry ; while to follow it into its various departments, and to show how its doctrines are to be applied in fitting men for the different occupations and pursuits in which they engage in life, involves the examination of details which would be altogether beyond the limits to which I must confine myself. It is enough for our purpose that the education of a civil engineer implies a distinct field of study from that of medicine or theology ; while the text-books they employ, in the attainment of the respective specialties of knowledge of which they are to make use, differ as essentially as the sciences to be taught by them. But when the processes of education, in its elementary forms, are examined, it will be found that, through all its ele-

mentary stages, all men pursue substantially the same track; and their paths only divide when they begin to fit themselves for the different employments and pursuits in life, which call for specialties of knowledge. Nor is it a slight circumstance in the economy of human life, that there is, to all, this plastic formative period of character and intellect, which serves as a tie of sympathy and union to the race, however diverse and estranged their after pursuits may be. There are, accordingly, certain powers which, in every educated man, must be developed and brought into exercise, whatever may be the sphere of active duty in which he is to engage, or the character of the labor he is to perform. To this extent, it may be said, the processes by which this is to be done are substantially the same. The instrumentalities may differ; as one man may learn grammar by studying its rules from a book, while another is taught it at home by always hearing language correctly spoken. It is the business of schools and colleges to seek out and apply the best and most efficient modes of calling out, and bringing into healthy, vigorous activity, the various powers and capabilities with which man is endowed by nature. But these are but one of the ways by which the same thing may be accomplished. There are men to be met with every day, who are what are called self-made and self-educated, who have had these powers developed by circumstances, often unconsciously, which quickened their habits of attention and observation, and compelled them to accustom themselves to forming prompt and intel-

ligent judgments. They were taught thereby, moreover, to accomplish ends by such means as were within their reach, and thus acquired the qualities of sound and practical good sense. Nor is it rare to see men, thus trained and educated, rising above and excelling those who have had the advantages of the schools. But, when we come to examine these two classes as a whole, we often find that, however eminent the self-educated man may be in certain qualities, or however perfectly he may seem to understand certain departments of knowledge to which he has been specially trained, he wants the ease and flexibility which it is the office of a liberal education to supply, by which he can successfully enter new fields of intellectual labor, and engage in new subjects of thought and investigation. It is the difference there is between the man of intuition, who forms his judgments from his own experience and observation, he hardly knows how, and the man of study and reflection, who reaches his conclusions through a process of investigation by which, in connection with habits of trained or disciplined thought, he is, at all times, ready to take up a subject, however new, and form a judgment thereon which others may rely upon and respect. And, while men may be educated by circumstances, it is none the less true, that, as a science, education has its laws which it is important for the student to understand and apply. Whatever means it may employ, its purposes and aims may be considered as always the same,—*to teach how to acquire and how to use knowledge.* The objects to which it is to be applied

are secondary to the means by which it is acquired. But, so far as it can be done, these means should always aid in the attainment of the knowledge which the student is to apply to use in the business of life. In its elementary stages, however, education has to be carried on with little apparent regard to this standard of utility. Even in the elective studies in college, books are read and subjects taught which the student does not expect to apply, practically, in after life. Problems in mathematics and philosophy are wrought out and solved at great expense of time and labor, which the pupil is never to turn to any profitable account in that form. The advantages which he is to derive from these are ultimate and remote. It is the power which such a discipline of the mind is giving him; it is the teaching him how to command the faculties and capacities which he will need when he comes to his life-work of acquiring and using knowledge, and how to do it with the greatest ease and effect. All that can be said is that, after long experience and much observation, certain processes have been deemed, on the whole, the surest modes of drawing out and invigorating the average powers and capacities of the human mind, giving to it strength, quickness, and healthy activity. And, though one mode of doing this may be by the routine of college training, which has no direct relation to the business or profession in which the student is afterwards to engage, if it has been once accomplished, it may be equally availed of in whatever form it may be applied. On the other hand, if we consider education in its connection with the acqui-

sition of only such knowledge as one is to apply in after life, the processes by which this is to be done must differ according to what this is, and the uses to which it is to be put. The merchant needs one kind of knowledge and one kind of training, the civil engineer another, and the clergyman and the lawyer still different ones. This training of the faculties, and the learning how to apply them to the gaining and use of knowledge, may be considered, in some sense, two distinct steps or stages in a complete education. But, after all, it is merely saying that one's faculties must be trained to a certain extent, before they can be profitably put to use; for it is not true that they ever arrive at perfection, or cease to be susceptible of a higher cultivation and improvement. After we have passed that stage when this culture of the faculties has ceased to be the chief purpose of education, that system must be the best which most effectually combines the two, — mental culture, and a facility of acquiring and skill in using knowledge.

3. The application of these remarks which I propose to make is to their bearing upon the subject of professional education. And, in the first place, its range is not confined to any specific or technical limits when considered in connection with the law. There is, I am aware, a prevailing idea that the teachings of the law are chiefly technical and limited to special topics; and that to master it, as a science, implies that it is to be done at the expense of broad and liberal culture.

But it only needs that we should recall the vast and varied duties and responsibilities — personal and public, as well as professional — which, in this country, devolve upon lawyers as a class, to understand that whosoever expects to excel in that profession, instead of being trained to a specialty alone, must make it a part and parcel of a still broader and more varied system of education. Not only must he have the fruits of a generous culture, but he must attain to a capacity to study and apply the laws of other sciences, as well as to acquaint himself with the various branches of knowledge which enter into the education of the schools. The profession of the law here includes not only the jurist, the counsellor, and the advocate, but the man of affairs. In short, he must understand something of the practical details of business in all its forms. In its ranks are found the law-maker, as well as the law-exponent; the sharp and sagacious politician, and the wise and patriotic statesman. I do not, in this, discriminate, as is practically done, between the classes into which those who enter the bar divide themselves, — such as pursue the proper business of the profession for its honors and rewards, and those who make use of it as a means of reaching distinction in other spheres, to which their ambition prompts them. I quote in this connection the language of M. De Tocqueville, who seems to have studied the genius of our people and their institutions better than almost any of the travellers who have been amongst us: “The lawyers of the United States form a party which is but little feared and scarcely per-

ceived; which has no badge peculiar to itself; which adapts itself with great flexibility to the exigencies of the time, and accommodates itself to all the movements of the social body. But this party extends over the whole community, and it penetrates into all classes of society; it acts upon the country imperceptibly, but it finally fashions it to suit its purposes." — "To this may be added that they naturally constitute a *body*; not by any previous understanding, or by an agreement which directs them to a common end, but by the analogy of their studies, and the uniformity of their proceedings, which connect their minds together as much as a common interest would combine their endeavors." He regards them, moreover, as a conservative element in our social organization; for, says he, "Men who have more especially devoted themselves to legal pursuits derive from these occupations certain habits of order, a taste for formalities, and a kind of instinctive regard for the regular connection of ideas, which naturally render them very hostile to the revolutionary spirit and the unreflecting passions of the multitude."

We are to remember, moreover, that a man, by becoming a lawyer, gives up none of his rights, and escapes none of his duties as a citizen. He adds to all these the duties and responsibilities which belong to the new relation he has assumed, by which he is to act upon the judgments of others, and to influence and control that opinion which gives character and effect to law itself.

4. Without dwelling any longer upon these preliminary and somewhat abstract views of what should be the ends and purposes of education in general, I hope to derive from them something like a clew to guide us in our inquiries into what should be a proper education for a lawyer. And, in the first place, I find no one of the powers and faculties that Providence has given him which can be safely or harmlessly neglected. He will find use for them all; and, what is more, he will need them at times in their full vigor and activity, to meet the demands which are made upon him, if he ever rises to the true dignity of the profession he has chosen. I know no calling which more rigorously demands a healthy body and a strong frame, nor one in which a clear, active, and disciplined intellect is more essential to command success. Nor are these qualities and capabilities the only subjects of culture which deserve the attention of a new beginner in the career of the law. The law, as a science, has its moral as well as its social and political aspects; and neither of these can be consistently neglected in what goes to make up a proper professional training.

Whatever analysis of the human mind, therefore, we may borrow from the theories of those who treat of its powers and capacities, we find in it an outline of the proper work of education in fitting a young man to acquire and use knowledge to the best advantage and effect. Thus we learn his perceptive powers are to be disciplined and quickened by using and understanding how to apply them.

That of attention is to be so trained as to be brought into subjection to the will, so that a subject may be held under examination until it shall have been looked at in all its bearings, and a distinct impression made, which the memory can, at pleasure, recall. So there is a power by which the mind separates a complex subject into its several parts, and presents each of them for separate consideration, by which, in studying its relations to other subjects, the useless or unimportant parts may be eliminated and laid aside. This power of abstraction, as metaphysicians call it, is among the most valuable qualities in a sound legal mind. Indeed, it enters into every sound and well-balanced judgment; and the facility with which it is applied forms, in no small degree, the distinctive grades of so-called legal talent. Of the importance of memory for a lawyer, I scarcely need say a word. It serves as a store-house, and supplies the key to the treasures of knowledge which he is required to use. By it he calls up his facts, arrays his precedents, and holds at his command the principles upon which he is to build up the conclusions of his judgment. Even imagination, wayward as it is thought to be, is a faculty which a lawyer may turn to valuable account, if it be properly trained, and held in check. By it he is often able to guess out and anticipate what he has to meet in his adversary's case, and thus forestall the effect of what he is to bring against him, by being prepared to counteract it.

Though these powers and faculties are assumed to be as common to men as the senses are to all

animals, they differ materially from the senses as subjects of education.

The intellectual faculties are not only slower in their development and growth, but the extent to which they are susceptible of being educated, compared with the senses, can hardly be measured by any scale or mode of computation. In looking out upon a landscape, the eye of a young savage may be quicker to take in the objects upon which it rests than the less acute vision of the young scholar. But he sees nothing beyond what strikes the senses ; while to the scholar, whose reflective powers have begun to be trained, the objects which the senses perceive are suggestive of new trains of thought. And the difference between the two grows more marked as they advance towards the maturity of manhood. While the eye of the savage, in that case, has added little to the quickness with which it first distinguishes objects, the reflective powers of the scholar have been constantly developing and strengthening by use, and lead us to believe that, of the moral and intellectual powers, the growth is never to cease.

It is not, however, true that everybody cultivates these powers. Half the world suffer some of their finest faculties and susceptibilities to die out for want of culture and exercise ; so that, in the absence of culture, man degenerates to a grade little better than that of a mere sensual animal.

The proper purpose of our schools, therefore, is to draw out and bring these powers into vigorous activity, to the highest degree of which they are sus-

ceptible. It matters less what a boy learns than the drill and discipline to which he is subjected while he is learning it; because the processes to which his mind is thus subjected have reference to the quickness and facility, the clearness and distinctness, with which he is afterwards to get and use knowledge. Education, in this sense, becomes a process of training and disciplining the mind; and the value of a text-book made use of for this purpose depends upon the clearness and distinctness with which its propositions are stated, and the power it has to command the attention of the student, and call into exercise his reflective powers.

You may have thought that I have limited myself to the mere elementary forms of education, while I have overlooked the fact that I am dealing with the advanced education of a professional student. But while it may be true that such a student may be presumed to have passed through the preliminary stages of his mental training, and is ready to engage in the next step in the process, of uniting with this the acquiring and using of knowledge, it is equally true that the instances are rare of one's entering upon his professional course of study so thoroughly prepared by previous training and culture as to take up a new science and master it with ease. He is very apt to find that it is only by a sensible effort he perceives and apprehends the thought or the proposition which is contained in the language upon which his eye rests, or to which his ear attends. And he soon finds that if this effort is continued for any considerable length of time, his mind

grows weary, and fails to perceive or retain the line of thought that connects the parts of what the author or lecturer is endeavoring to illustrate or explain. Even the best-trained mind experiences difficulties like these at times. But one of the most encouraging circumstances connected with a student's effort to discipline his mind by patient and persevering study is, that as he proceeds he grows conscious of having, more or less effectually, surmounted the clogs and restraints which at first hinder his progress, while his work becomes easier, and his attainments more rapid, with every step in his advance. A lawyer, for example, whose powers have been properly trained, will take up the report of a new case, and master all that is worth knowing in it, in a quarter of the time in which a new beginner would be able to study it out. It is not because he is a member of the bar, but because the modes of investigating causes which he partially learned in preparing for an admission to it have become familiar by repetition, whereby the earlier processes of his education have been carried forward to greater perfection.

— I have had a double object in thus dwelling upon elementary education, in its connection with a preparation for the bar, — first to indicate the purposes and advantages of a college training, but chiefly to encourage such as have never enjoyed this to persevere in the course upon which they have entered, by assuring them that it is still within their power to supply, in other forms, the defects under which they may find themselves laboring. There is a popular

idea in the world, that whoever has the voucher for scholarship which a college diploma is supposed to furnish *knows* so much more than those who have not enjoyed its privileges, that, for a student at law, the want of these presents an obstacle in the way of progress which it is difficult, if not impossible, to overcome. But if any of you entertain such apprehensions, it is due to you to say, that, if a college graduate has any advantage over such as come from the schools and the various avocations of active life in the country, it is not in the amount of actual knowledge he has gained so much as in the facility with which, at the start, he may command his powers in acquiring and using knowledge. And, in saying this, I ought also to remind you that while there is no royal road to learning, so there is no single and exclusive way through which a young man can train and educate his powers, or fit himself for distinguished success in the field in which he may have occasion to use them. It often happens that the very experiences through which he has been called to pass may have served to train him for this start; and in the end, by industry and effort, he may leave his more favored competitor for the honors of a profession far behind him in his course. But this, again, should ever be borne in mind, that no previous preparation, however thorough and earnest, can avail in reaching the higher places of the law, unless it is followed up by honest and earnest efforts to excel after he shall have taken upon himself its duties and responsibilities.

If I am correct in these views of the means and

ends of education, I may start with the assumption that you have, each of you, enough of those powers which it is its business to train, to justify a confidence that they are susceptible of higher cultivation ; and that you have, each of you, reached such a stage in its elementary process as to be ready for a still greater and more rapid advance. And it is in this belief that I ask you to go with me, while I attempt to point out some of the more obvious steps by which you may hope to become useful and respectable members of an arduous and honorable profession. Let me, however, remind you, to begin with, that while others may direct your course, it is you who are to meet its duties and its difficulties. Yours is to be the work. And while you may call others to your aid, yours is to be the ultimate triumph or defeat. You may borrow other men's thoughts, but you cannot make another man's organs of thought your own, and must rely, at last, upon such as nature and education shall have planted and developed within you. In the next place, you are to remember that these organs of thought are more or less subject to the control of your own will, as you shall have more or less highly trained and disciplined them for use ; and that in the realm of your own mind you are a monarch more or less absolute, as you have learned how to exercise control over it. So that it is to yourselves that you are to render an account for the manner in which you make use of the advantages put into your hands, and, in no small degree, for the progress you make in the education upon which you are entering.

One of the great purposes to be aimed at in a legal education is to learn how to think, and what to think about. This is something other than a mere exercise of the memory. The gathering up of learning without knowing how to use it is little better than heaping up useless lumber, which can do no good to any one. It implies, in the first place, not only the process of making knowledge one's own, but the power of digesting it in the mind, and so assimilating it as to make it a part of one's individual self, — supplying the memory, exercising the thought, and confirming the judgment. And the more fully and completely this is done in respect to an individual, the more nearly does a legal education in his case reach the purposes for which it is intended. The modes by which this is ordinarily sought to be accomplished are by books and by oral instruction. Though a science, law cannot be illustrated or explained by figures or diagrams addressed to the eye, nor by any such apparatus as the chemist or the teacher of natural philosophy employs to make palpable the truths he seeks to establish. The principles of legal science reach the mind through other media than the images which the eye communicates, or the impressions which are made upon the external senses. It is by words alone, as they are the expression and representative of thought, that the student can gain a knowledge of them. It has, moreover, its own terms of art, and forms of phrase, which he has to make his own before he can understand the sense in which they are employed when he finds them in the books he reads or the lectures

he hears. The next step in his progress is to get some definite notion of the relations which the parts of the law bear to each other, and the connection it has with the transaction of business and the condition of things in the world around him.

5. But, unfortunately for the ease and convenience with which this may be done, the law, unlike most other sciences, has no well-defined, simple elements which lie at its foundation, upon which a broad and complex system may be built up, suggesting the order and arrangement of its parts, and how it can most easily be mastered as a whole. It has no fundamental rules, like arithmetic, by which to work out its problems and propositions; and, let the student begin where he may, in any course of study, he soon finds that to understand what he is reading implies a knowledge of something anterior to that with which he started. The law, besides, is not only as broad in itself as the interests and relations of human society, but is constantly growing and expanding to supply the ever-increasing demands of advancing civilization. Every system, indeed, of jurisprudence in the Christian world has for its foundation the revealed law of God, and that acknowledged code of Christian morals which civilized nations profess to respect and observe. But the body of written and unwritten law which has been built up upon these, by which the wants and necessities of mankind are provided for, and the complicated relations of trade and business are regulated and controlled, can hardly be conceived, much less

understood, by any one who has not made it a subject of long and patient study and investigation. It has not even the homogeneity of any one age or nationality. It borrows its principles from the experience of a long succession of ages, and reaches beyond the geographical limits of States in the interchange of comity between nations, and by the contributions of each to the laws of the others, in the way of trade, commerce, and habits of thought which prevail among them. And it is in this way that the body of the American common law is being constantly liberalized and enriched from the stores of Roman and Continental systems, the learning of the civilians, and the new principles which are being developed by the sages of the law in Westminster Hall. And when we add that of this vast and limitless field of inquiry we have no accredited chart to guide us in our researches, no single code embodying its principles, nor any standard defining the relation of its parts to each other, it is not extravagant to say that no single life is long enough to master it completely. Whoever should start with an expectation of doing this would be sure, in the end, to meet with disappointment and defeat. What, then, you will be ready to ask, can be hoped to be accomplished in three years, saying nothing of those who assume, as some do, to "fit" themselves for the bar in even a shorter time than that? Waiving, for the present, the question of the requisite period for a preparation for the bar, the most, as it seems to me, that a student can hope to do within that time, is to get a pretty definite notion

of what law is, and the subjects of which it treats, together with some of its more important truths and principles ; and, in doing this, to learn how to make further progress when he comes to the bar, by applying himself to the discovery of new principles, and learning how to make use of the knowledge he has and may acquire, in the business of solving questions as they arise in his practice. Starting in this way, every step he takes aids him in taking the next higher one in his course ; till, after having acquired enough of these principles and their application to serve the ordinary demands upon a new beginner in practice, he may enter the profession, going as it were into a higher school, to pursue still further the science of which he has but acquired the rudiments.

6. But this does not answer the inquiry which some may make,—which and how many of these truths and principles he must acquire as a pupil, before he undertakes the responsibilities of becoming his own teacher ? The only way in which we can approximate a solution of this inquiry is by looking over the ground, and seeing what he will there have most occasion to know, and what to make use of. He can very well put off great constitutional questions till he has made himself somewhat familiar with municipal law. On the other hand, he will, from the first, be expected to be ready to draw ordinary deeds and wills, and other legal instruments which are in use in the transaction of business in the community where he lives. He will, moreover, be expected to be able to give safe counsel in relation to the laws

of business, the rights of property, and the duties of a citizen, in all cases which involve nothing new, strange, nor particularly complex. Not only must he be prepared, if called upon, to draw a writ and an ordinary declaration, or, if called into a defence, to frame a proper plea or answer to the plaintiff's action, but to carry on a suit and conduct its management in matters of ordinary difficulty and importance. But even these, few and simple as they may seem to be, imply a tolerable familiarity with many volumes of bound matter, as well as outside learning and illustration, drawn from unwritten and traditional sources ; and, in respect to some of them, the actual doing and repeating of many things which are merely mechanical, till the mechanism and much of the science involved in the proper practice of the courts are fully mastered. In doing these acts, he will often find occasions when he must put into requisition knowledge which he must have ready at hand for use, without being able to stop and examine treatises, or hunt up precedents to aid him in his conclusions.

The question, then, again recurs, How is the student to prepare himself to do these things? How and where is he to begin? It does not take him long to discover that he may read ever so diligently upon one topic in the law, and gain very little light upon any other. He may read a work on the law of real property ever so carefully, and be able to tell how the doctrine of uses enters into the forms of modern conveyancing, and why an independent freehold cannot be conveyed *in futuro* at com-

mon law, and yet know nothing of the law of bills of exchange, or the warranty that is implied in the sale of personal property. But, as he pursues the study of the law further, he begins to perceive that it has its departments and subdivisions which may be studied separately, while he finds certain relations between them all, and certain principles which are common to them all. If we undertake to analyze and give names to these departments, we shall find that they embrace Real Property, Contracts, Pleading and Evidence, Equity and Criminal Law; while among the more important subdivisions are the Law of Domestic Relations, of Torts, or private wrongs, of Wills and Administration, and Shipping and Admiralty. I have not mentioned Constitutional and International Law, as both of these are more or less associated with the science of politics. And I may add that the more the subjects above enumerated are studied, the more clearly the student perceives how they run into each other, and furnish illustrations by the aid of which each becomes more fully and clearly intelligible. The investigation of these forms a part of the proper training of a student; while he may, at the same time, be gaining the power to discriminate between what essentially belongs to each department of legal science, as distinguished from another.

When I repeat that a student must know something of each of these departments before he can be regarded as even tolerably fitted to practise the profession acceptably, it is but assuming, in another form, that he must take them up separately, and in

something like an orderly and systematic manner. No ordinary exercise of judgment could compare and arrange such diverse elements into a homogeneous whole, even if the memory could retain them, as would have to be acted upon by a student's mind, if he were to take up these subjects promiscuously, and without regard to some system. He cannot, therefore, read a little upon one topic to-day, and a little upon another to-morrow, — although there may be a principle of association and relation between them, — unless he reduces his mode of study to a system, in which each successive step shall help in taking the next. If he will, moreover, so arrange his topics, by a regular alternation of subjects, as to relieve the tedium of too long a drag upon the attention by confining it to one alone, he may make a more rapid and pleasant progress in respect to each of them than he could in either separately.

But when we come to the order in which these topics shall be taken up, and how much time shall be bestowed upon each, we find ourselves embarrassed by the want of some ascertained principle to guide us. If we had any thing like the four fundamental rules of arithmetic in the science of law, after mastering which we might enter upon the practical combinations that may be wrought out by the more complex rules of mathematical analysis, we could hardly be at a loss how to direct the progress of the student. But such is not the case, and, from the nature of things, never can be; nor am I aware that any one has attempted to lay down a set of rules which could be of universal application in solving

the questions which students at law have to grapple with in the prosecution of their studies. When he has been told that the law merchant has its special rules and principles, and that the elements of the law of real property differ essentially from the doctrines which are applicable to crimes and torts, he has made no advance in settling with the study of which of these he is first to engage ; and the nearest he can approach to a rule is, that he should do it successively, and with one of them at a time. If he can make himself reasonably master of the leading familiar topics of the law, he will find himself able, in a short time, to grapple successfully with the more difficult questions which he may have to encounter in any of its departments.

7. When we come to the question, by what books or treatises he can be best taught how to do this, we shall find the number indeed small of which one can speak in terms of unqualified approbation. No modern Gaius has yet appeared who has been able to do for the common law what that renowned jurist did for the body of the Roman law,—prepare a treatise which might be received as a text-book for students, whatever changes the law might undergo in its details by the revolutions through which the government may pass. The only book which has been regarded as an elementary treatise by a kind of common consent, and to be first put into the hands of a student, is Blackstone's Commentaries. Nor need we hesitate to adopt it as such, notwithstanding the severe and even ill-natured criticisms

to which it has been subjected by modern writers.¹ I may at least say I know no work which so well supplies the wants of beginners in the study of the American law. It will be time enough to lay it aside when a better one can be substituted for it. Among its claims to preference is that it forms so complete a summary of the English common law, from which our own is borrowed, as it was at the time of the severance of the colonies from the mother country; and thus furnishes, as it were, a historical starting-point in the study of our own common law. An additional value has been attached to this work, which lends to it a still stronger claim upon the favor of the American bar, by two excellent editions of it which have been recently given to the public, and have become too well known to need a word of commendation on my part.² Another excellence which it has is the orderly manner in which its topics are treated of, and the historical as well as dogmatical form in which the principles it enunciates are presented. Even one of the severest of his critics, who says of the work, "I know no reading more humiliating to an English jurist than that of the exaggerated praises which have been bestowed upon Blackstone's Commentaries," has the frankness to say: "That the work has been of great practical service to students of the common law cannot, of course, be doubted."³ It is not, I repeat, so much

¹ See 1 Sharswood, Blackstone, xx.

² One by Judge Sharswood, of Philadelphia; the other, by Judge Cooley, of Michigan.

³ Jurisprudence, by C. S. M. Phillips, 35.

a question whether the work is all it should be, as it is whether a better can be found. And in one respect there is little danger of over-estimating its merits, and that is in its being a model to the student of a pure English style. In the language of Jeremy Bentham, who did not coincide in all the views the author advanced, "He it was who first of all institutional writers has taught Jurisprudence to speak the language of the scholar and the gentleman."

And this quality, if it had none other, as a means of training or fitting a student to write and speak good English, is a sufficiently rare one to give the work a prominent place in the *curriculum* of a legal education. Without pretending to settle how far it is wise for a man who has but one life to live to spend as much of it as would be requisite to read all the works which some writers recommend *preparatory* to taking up Blackstone; or undertaking to prescribe a list of books to be read in preparing one's self for the bar, as is often confidently done,— I only need remark that the same reasons which suggest the propriety of treating Blackstone as a text-book for the English law would commend a work of like character upon the American law, if it could be found. And fortunately we have one in the Commentaries of Chancellor Kent, which had, at least at the time of his death, enough of the same qualities to claim the second place in the course of a student's professional reading. Let him study these works with proper care and attention, and he will be reasonably prepared to take up the subjects of which they treat in detail; following, in this respect,

what seems to be a proper rule in the study of law, — beginning with general principles, and tracing them out as they are illustrated in the consideration of particular subjects, and finally of particular cases. Thus the topics which are treated of in the four volumes each of Blackstone and Kent will be found to have furnished the subject matter of volumes by scores in the hands of other writers. Nor is it easy to lay down any course of reading by making selections from these works; and our objection to attempting it would be the chance that books thus recommended may, in a short time, be superseded by new and more popular treatises. The only rule that seems to me to be safe or practical, in such a plan as I have proposed for myself in these lectures, is to endeavor to adapt my remarks, as to what students should read and study, to the purpose which a majority of them have in view, — an admission to the bar and its practice, in the briefest possible time which can be consistent with a reasonable chance and hope of success. But it is to be remembered, that professional practice in this country is not limited, as in England, by subjects and specialties. Instead of being divided, as there, into barristers and attorneys or solicitors, the members of the American bar are expected to be ready to act the rôle of either or both of these as occasion may require. The same practitioner often goes from the court-room, where he has been pleading the cause of a client before a jury, to give counsel to another client in his office, or to draw a deed of land, or prepare the form of an agreement; while another client still may be waiting

to instruct him how to draw a bill or an answer in equity, or to have him construe a will, or assist in putting into form an account as guardian or administrator. And all these, and twenty other like things, he is expected to be ready to do at a minute's notice, because they are all parts of the business of a lawyer, irrespective of any class to which he belongs. But as we look at this variety of employment, the inquiry presents itself, how the student is to acquire learning enough, in the brief time usually allotted to a preparation for the bar, even to *begin* its practice. And the answer is found in the mode in which its requirements are made and met. No one expects the beginner to be ready in all things. His ordinary engagements, at first, are in the less difficult parts of the practice; and, before occasion ordinarily calls for a more extended or difficult application of his learning or skill, he generally has time to acquire the one, and to know how to apply the other. This implies, what I have before said, that by gaining admission to the bar, a young man has but taken a second step in a course in which progress can alone be made by study and attention to business. I state this, though it need no argument to sustain it, by way of explanation; lest I should seem to ignore the recommendations of writers upon the study of the law, whose works are to be found in almost every considerable library, in which the titles of numerous volumes are recited as those which are to be read by a student before his admission to the bar. The judgment of these writers has reference rather to what it is desirable for a student to study than what

they deem essential and indispensable for him to know; whereas, when addressing myself to a body of students, with only an average amount of time and money to expend, which we all know leaves but little choice on their part, I am bound to assume that the term of novitiate for a student for the bar is to be the shortest in which he can possibly get what it is necessary for him to begin with. All else is to be added after he has passed this point.

8. Among the things he must know are some of the more familiar details of what is called practice; and it is often a matter of discussion when and how he can best acquire this. Though in many respects much of it may be regarded as mechanical, and wholly subordinate to the science of the law, to which it is auxiliary, its importance to the student can hardly be overestimated; since accuracy in this is often made a test of what a young lawyer knows upon entering his profession. The public will sooner overlook and pardon an error in judgment, or a mistake in a legal conclusion, than excuse a blunder in doing a piece of business. It is difficult at times to form a conclusion whether a legal opinion is correct or not, whereas most mistakes in doing business are patent and palpable. A client may often excuse his legal adviser in construing a deed, though he come to a wrong result, when he would set it down as something beyond apology or excuse in a young lawyer if he were to draw a deed, and by inadvertence should omit the word "heirs," for example, and thereby raise only a life estate where he meant

to create a fee-simple. And he might, moreover, get a reputation for incapacity and want of learning by this simple mistake in a mere matter of form. I could mention instances where young men had been more than ordinarily diligent in their studies, and their proficiency in the attainment of the principles of the law had been highly creditable; but, having never attended to the forms in which business is done, they found themselves, upon their admission to the bar, so little prepared to meet the most ordinary demands upon their skill and capacity, that they voluntarily shut their offices, and suspended their attempts at practice until they had first learned how to do it.

Without stopping to inquire in what part of one's initiatory course, or in what manner, a requisite knowledge of practice can best be attained, it may be proper to remark, in passing, that so far as learning can be predicated of the transaction of business, it is more in accordance with the laws of philosophy to become an adept in the *principles* of a science which one is to apply practically, before he undertakes to put them to use, than to begin by mechanically repeating forms which, at best, are mere instruments by which effect is given to these principles. An apprentice to a trade or craft may learn how to do a thing by repeatedly imitating what he sees another do, and in the end may reach the principle upon which it is done; whereas, had he been told beforehand what this principle was, it might have saved him much labor, and, moreover, have suggested how he might apply it to new

and unaccustomed emergencies. So, though no two pleas or contracts may be exactly alike, but must be varied to suit the circumstances of each case, it would not be difficult for one who had been taught how to draw one of them, and at the same time had studied the principle upon which it was done, to frame a new form which might vary materially from any he had ever before attempted to draw.

But before I pursue this subject further, or undertake to lay down any rules as to the kind and amount of knowledge which a student ought to possess before offering himself to the public as a professional guide and counsellor ; or as to the particular times in his preparatory course when he is to take up the study of the several subjects which he is expected to understand, — I propose to consider how he is to do this, and what are the best means for training and fitting him to acquire knowledge and apply it to use.

LECTURE II.

STUDY. — *Continued.*

1. Whether alone or in an Office. — 2. In a Law School. — 3. Schools as a Means of Liberal Culture. — 4. Processes of Instruction. — 5. European and American Law Schools. — 6. Lectures. — 7. Recitations. — 8. Text-books. — 9. Habits of Study. — 10. Time to enter a Law School. — 11. Hours of Study.

1. In looking at the subject how a student may best educate himself for the bar, with the fairest promise of success, three modes present themselves as the most usual and feasible. One of these is by the diligent study of books, and gathering up in the memory the principles which may be found in treatises and volumes of reported cases. Another blends with this the teachings that may be gained in the office of a practising attorney, by taking part in the details of the business, by the occasional hints and suggestions which he may gather from the head of the office, and by the practical experience he may thereby gain, that may be of use to him in his own business. The third to a certain extent combines both the others, though it but partially supplies the practical training which can, in fact, be gained only in an office; and that is a well-regulated law school. In respect to the first, I apprehend there are few young men whose minds, upon entering upon the study of law, are sufficiently trained and disciplined

to profit to any great extent by the unassisted reading of books. They necessarily treat of subjects that are outside of their ordinary habits of thought, and are little better than a succession of dogmas, which are not only abstract in themselves, but their relations to each other are not obvious at first, and are to be studied through the medium of terms which, from being unfamiliar, require to be explained in order to be understood. I do not say that a great deal of law may not thus be acquired, or that, as a mode of study, it may not succeed to a certain extent. But I do say that for minds as they arise, the experiment is of such doubtful expediency that few would venture to advise it. If one were to make no mistake in the selection of the books he is to read, how is he to distinguish what he is to read with one degree of attention, and what with another; and whether he shall commit what he reads to memory, like the answers to a catechism, or content himself with a general undefined impression of the substance of what he finds in the book? The subject in itself is so vast, its parts are so numerous and ill assorted, that few things can be more discouraging to a sensitive mind than to enter upon it without a guide and an assistant. We have the personal testimony of Sir Henry Spelman on this subject, who afterwards became one of the most learned sages of the law. His experience relates to a time before the science of the law had been reduced to as near an orderly system as it now is, and was about the time of the settlement of New England. In the Latin, which he made use of in composition, he tells us how his

mother sent him to London to study law. But when he had entered the vestibule of its temple he found a foreign tongue, a barbarous dialect, and a confused method, and a mass of matter not only huge and unwieldy in itself, but one which had to be borne up with one perpetual effort, or, as he says, "*perpetuis humeris sustinendum*." And he adds, with admirable simplicity, that in contemplation of this, "*excidit mihi (fateor) animus*."¹ Nor was he the last man, I apprehend, who has found his heart failing him when, on entering upon the study of the law, he has begun to realize the task he is undertaking. It is one in which the most successful find aid convenient, while to a vast majority it is all but indispensable. How this aid shall be rendered, often depends upon circumstances. A single word of explanation may sometimes serve the student as a clew to the meaning of what he is reading; or a single suggestion may furnish the limitation under which a proposition is to be received, or point out its relation to others, which, at first, seems obscure and hard to understand. The illustration that he needs may have, moreover, to be drawn from something which he has not yet reached in his reading; or may depend upon some usage or elementary postulate, which has a traditionary origin only, instead of being derived from reported cases, or written out in the pages of his text-book. It is in cases like these that the student finds his advantage in having some one at hand to whom he can appeal with confidence for necessary explanations. Nor is this all. He needs

¹ Preface to Glossary.

some one at times to take him by the hand and help him over the rough passages in his way, by such kindly hints and suggestions as one only can give who has himself been over the way, and has learned how to escape or surmount these. And when he comes to the matter of books he shall read, and the order of the subjects he is to study, with reference to their effect upon his mental training, as well as the attainment of knowledge, he finds the counsel of men wiser and more experienced than himself not only useful and profitable, but often of unspeakable advantage.

Books which profess to treat of the study of the law furnish us, by way of example, accounts of numerous students who have wasted time and bestowed labor in endeavoring to learn what, if obtained, could be of no possible use to anybody, merely because they had no one competent to guide them as to what they ought to study. And if I may be pardoned a personal allusion, I might cite my own experience as an illustration of this remark. Somewhat early in my preparatory course, Cruise's Digest was put into my hands to read, without any intimation that one part was not as important as another. It was before an American edition of the work was published, and it contained elaborate treatises upon tithes and copyholds, among other topics of English local law. And to these I devoted days of weary labor, and took careful notes, after a critical study; which was about as useful in advancing my legal education and fitting me to practise law in Massachusetts, as if I had spent the same time in attempting

to decipher the hieroglyphics on an Egyptian obelisk. Five words by way of a hint, when I began the book, would have saved me such an unprofitable waste of time and labor.

What I have been saying of the advantage of having some guide to aid and direct the student in his reading has no tendency to show whether this can be best rendered in the office of a lawyer or in a law school. How far it may be obtained in the former depends in no small degree upon the habits, character, and business of the one to whom the student is to look for his counsel and direction. You will bear in mind that I am not now speaking of learning practice. That remains to be considered hereafter. I am confining myself to the proper study of law as a broad and liberal science. There would be little to attract a student to the office of a lawyer, however competent or able he may be to teach, if he have no leisure in the intervals of his business to devote to the instruction of his pupil. The same would be true as to the office of one whose time is given up to some particular department of the law, as is often the case in our larger cities, where the business of the profession is classified and divided into specialties. One would make slow progress in the study of the law of real property in the office of a lawyer whose specialty was admiralty or commercial law. Regarded as a place for study and improvement, the only office which one can confidently recommend to a student is one where a good amount of general business is done; and even then very much depends upon whether the proprie-

tor has sufficient leisure and taste and aptitude to understand and apply the requisite aid and encouragement, by the way of watching the student's progress, and furnishing hints and suggestions which shall keep alive his interest, and help him to measure his own success. Compared with a course of solitary reading, such an office as I have supposed possesses unquestionable advantages. But of the lawyers who are thus qualified by learning and temperament to be the instructors of young men, a very large proportion so early become engrossed in their duties and cares, that the charge of a student becomes secondary and subordinate; and he is left to fill up, as he may, a desultory and fragmentary course of reading out of such books as he finds in the office. A writer in the "Western Jurist," with admirable frankness, when speaking of studying law in an attorney's office, says: "Of all places in the broad universe to prevent mental discipline, and destroy it if possessed, commend me to the office of an attorney in full practice."¹ It is not strange that it should be so. Teaching is not the subject of such attorney's thoughts. His attention is engrossed in other people's business, and the student in his office is necessarily a secondary consideration. And yet such an office has its advantages. The student there sees something of the ends and purposes of the law. He becomes more or less familiar with its terms. He hears questions discussed which are new to him; and he gradually accustoms himself thereby to think and to speculate upon subjects of

¹ Western Jurist, vol. v., p. 5.

civil rights and social duties, which may become practically important in forming and enforcing his opinions when he shall have occasion to put his learning to use. This lack of systematic discipline and culture, which a student in an office too often experiences, is more likely to be felt by such as begin their course without a previous experience of a thorough school or college training; which must be supplied, if at all, by cultivating in some way orderly habits of investigation and sustained thought.

2. Passing now to the subject of law schools as a means of preparing students for the bar, we shall have occasion to see how far they are calculated to correct and supply the defects that are incident to the modes of which I have been speaking. In our own country they are altogether a modern institution. Many can remember when there was but one of these in the United States; and even in England, notwithstanding what the Inns of Court may have done for the education of barristers in former times, I apprehend it would be difficult if not impossible to find a single institution answering to the American law school. Notwithstanding the idea of courses of lectures for the students in these inns, if we may judge from the writings of those who have discussed the subject, they supply but an inconsiderable part of the teaching and instruction which are requisite to a proper preparation for admission to the bar. But if we go back to the early history of law schools, we find them holding a most important place in the teaching of the Roman law. The schools

of Berytus, Rome, and Constantinople, in fact, wrought an entire revolution in the mode of teaching this law.¹ And in our own country the extent to which they have multiplied shows a growing sentiment in their favor, while the impression has been strengthening that they offer the best facilities to a student who desires to lay a firm and proper foundation for eminence and success in his profession. Instead, therefore, of a single school of this description in 1820, the country now has twenty-three, with a constant tendency to an increase in numbers. As these are to be regarded as established institutions, the question before us is not which of them to commend, but whether the student shall choose some one of these rather than to read law by himself, or seek instruction in the office of an attorney.

To answer this inquiry, we must go back to the original question with which I began: What is meant by a lawyer's education? As we have seen, it is not the mere getting of a certain amount of knowledge, or what is called learning, independent of the manner of using it. Nor is it the reading of a certain number of volumes, or the being able to cite a certain number of cases, unless he, at the same time, knows how to turn these to account in his practice. Even if he has accomplished this, it is but a part of what he needs to know: one of his purposes in learning how to get and use knowledge is to influence thereby the judgment and opinions of others.

¹ Tomkins, Roman Law, 108.

3. But to do this effectually, he must know men, and study the volume of human nature thoroughly and practically. He can no more do this by the reading of printed volumes of books, without coming in contact and intimate association with men, than he could acquire the ease and graces of polite society, or make himself at home in the drawing-room, by reading Chesterfield's letters, without ever going out of his own chimney corner. Nor do I know where a student can so readily or so effectually make progress in this essential part of his education as in a law school, where he feels the unconscious restraint of courtesy in his intercourse with his teachers while he mingles with his associates in the kindly relations of fellowship and familiarity. Among generous and right-minded young men, especially such as are bound together by the sympathy of a common pursuit, an instinctive respect for the favor and good opinion of each other springs up spontaneously, which shows itself in the self-imposed restraints of good breeding, and grows into the habit of his life. Whoever lacks this courtesy of a gentleman is in danger of unconsciously falling into the opposite habit, which repels rather than attracts those with whom he comes in contact. There is, among the better portion of the profession, an unwritten law of conduct and good fellowship, which gives rise to a generous *esprit du corps*, that becomes doubly strong when it is gained at the same school and cherished by the force of early association.

Another advantage which grows out of young men associating with each other at a law school is

its effect in liberalizing their minds, and breaking down the lines of early local and narrow prejudices in which they may have been educated. Coming, as they often do, from localities remote from each other, and accustomed to different habits of life and different views of things, they soon begin to perceive that diversity is the normal condition of society; and one is soon led to conclude that men may differ from him in sentiments and opinions, and yet be entitled to his confidence and esteem. And to men whose business it is to be to deal with other men's affairs, and to seek at times to influence and control other men's judgments and wills, this lesson becomes of immense value and importance, in fitting them to encounter the experiences of life to which they will be subjected. Whatever advantages these are to a young man in the way of his education, they are not to be got from books. And while the effect of having them or otherwise is witnessed every day in advancing or retarding his success in life, they are something which he cannot gain by lectures or study alone. The society of a single associate may often do much to impress these lessons upon a young man's character, habits, and manners in the formative period of a student's life; and if he is fortunate enough to share the teachings of one who to adequate learning adds a quick and ready sympathy, which understands and feels the hopes and difficulties and discouragements of an earnest young man while he is directing his studies and smoothing the way he is to travel, he will soon perceive how much of his present success, as well as the hopes

that are to cheer him on in his future course, he owes to the impulse he has received by these combined influences of the school. Then, again, some of these schools are more or less intimately connected with a college or university, and are surrounded by an atmosphere of literature and science. And, when this is the case, one can readily see another liberalizing influence upon a student which he would ordinarily lack in an office. While these are among the more obvious advantages to be derived from law schools, considered as places in which a student may pursue his education, their claims are still stronger when the processes are considered by means of which it is sought to train and educate him there.

4. These processes are usually three, so far as form is concerned ; though all are directed to the same end, and have a common purpose, and may be at times modified by circumstances. One of these consists in the reading of well-accredited treatises upon law, and the study of reported cases ; another, in oral lectures, and instruction upon the subject treated of in the books which are studied ; and another, in learning how to apply what has thus been acquired, by investigating real or supposititious cases, and arguing questions in moot courts, or drawing up formal opinions upon matters submitted to the student for examination. The first of these assumes that the student is supplied with a suitable and sufficient library, and would naturally imply that, in making a selection of books, he is to be aided

and directed by the judgment and experience of a competent teacher. And if the question went no farther than the mere reading of books, I should have little doubt that a school is preferable, as a place to do this, to an office or one's own study. But my purpose further is to compare the reading of books with lectures, as a mode of teaching law, to the end of ascertaining whether a combination of the two, as above proposed, is not preferable to either separately.

5. If we borrowed our ideas from the European universities, we should be apt to suppose that the preferable mode was that by lectures. It seems to be the only one in use in the German universities. In that of Berlin there are a score or more lecturers, whose courses occupy the whole day, with a brief intermission, from eight o'clock in the morning till eight in the evening; and these are so arranged as to cover, by separate courses, the entire subject of law. And when we come to speak of recitations as a mode of instruction, we should bear in mind that these are not adopted in German universities; although they have in the "Corpus Juris" a text-book of permanent and universal authority, whose propositions are sufficiently definite and compact to be readily reduced to the form of question and answer. The mode of teaching law in the schools of the Roman empire occupied five years, during four of which "the four books of the Institutes of Justinian, and the first thirty-six books of the Digest, were the subjects of recitation and exposition, under the guidance

and instruction of the professors.” — “In the fifth year the Code of Justinian was read and explained.”¹ In determining how far lectures are feasible and expedient as a mode of teaching law in our country, little aid, I apprehend, can be borrowed from the usages of the German universities; because of the difference in the circumstances under which a student there begins his course in a law school, from those under which many, if not a majority, of such students begin in this country. There a student, before admission to the law department of the university, must go through a prescribed course in a gymnasium — answering, in many respects, to one of our colleges — and then be subjected to a critical examination to test his fitness to enter upon the study of the law. He in that way has gained, what so many of our students lack, habits of reading and thinking; and has already acquired and been trained to processes of acquiring and applying knowledge through the teachings of others. Whereas, in a catalogue of one of our law schools, only seventy out of one hundred and fifty-four members appear to have graduated at any college. In the next place, such a student, to obtain a degree from a German university, must remain a member three years, and after that go through a careful and thorough examination; whereas two years is the limit of such a student’s course in the law schools of this country, while by far the larger number content themselves with shorter terms of instruction.

Any mode, therefore, of teaching which is adapted

¹ Tomkins, *Roman Law*, 116.

to a body of German students might be found unsuited to the wants of an American law school. And my conviction is very strong that for these schools a careful, orderly, and diligent course of reading and study is an indispensable part of a student's education. It lies at its foundation, and forms the basis upon which the rest of his education is to be built up. And in this a well-regulated law school lends important aid to a student in various ways. Not the least of these is the life and interest which it gives to a study by having several engaged in reading the same books at the same time, solving the same problems, and needing and seeking the same explanations by way of removing difficulties which they encounter in understanding and applying what they read. They aid each other, and keep each other's attention awake, and thereby tend to fix important principles in the memory, however abstract they may at first seem; and the discussions to which such an interchange of views give rise serve to cultivate and confirm habits of ready investigation as well as of clear and continuous thought. Reading may, in this way, be made a means of training the mind, as well as of storing it with knowledge; while it is itself capable of being essentially supplemented, as an educational process, by oral lectures and comments or recitations.

6. It should be remembered, however, that lectures, as they are generally understood, are of two kinds. In the one, the lecturer seeks to supply the want of a text-book, by selecting a subject and treating it as

a whole, as well as by taking up its parts in detail. In the other, he adopts a text-book as the basis of his comments, and seeks to make the topics of which it treats more plain and intelligible by explanations and illustrations of his own ; thus enforcing the principles which it teaches, and correcting the errors or omissions, if any, into which the writer may have fallen. He not only lays down a dogma, but gives its history ; details the circumstances which led to its development as a principle, and shows how it is applied in business and enters into the laws of society. And in this way he carries out the idea of an "Exposition" spoken of by writers on the Roman law, which the professors of that law formerly made use of in teaching the Digest and Institutes. To a lawyer of observation and experience such an exercise would be no very difficult labor ; while to a student it would serve an invaluable purpose in throwing light upon what he is reading, and, what is hardly less, giving a new interest and attraction to dry and uninviting treatises. Such, let me add, answers my idea of what is needed by an "exposition" of a subject, and may be adopted to advantage in respect to many of the things which engage a student's attention. In this way he may be taught the law of real property, of equity, of contracts, and of torts, and criminal law. On the other hand, some subjects may be successfully treated by the means of lectures alone. And among them I would include constitutional and international law, wherein so many of the principles involved, and their application, are to be drawn from history, and the practical workings

of the rules to which these have given rise. To do this with success, the lecturer must make the subject his own, clothing it in his own language, and following it out through the medium of his own trains of thought and reflection. In either of these forms of presenting a subject, the student is conscious of another decided advantage over that of reading a book, — in its being addressed at the same time to his sense of seeing as well as hearing, and in the life which the instruction borrows from the action and gestures of the lecturer, as well as from the circumstance of place and the surroundings in which he is heard. And if, besides all this, a student will accustom himself to take notes of what he hears, in such a form as to be afterwards applied to practical use, he is accomplishing more than one important end, — in facilitating his taking notes and minutes in court when he comes to the practice, and in fixing and arranging in his own mind the propositions to which he listens, whereby he is laying up a stock of valuable material to stand him in need if suddenly called on to give judgment in a matter upon which he may be consulted. While I have thus spoken of the advantages of lectures in connection with reading, as compared with a course of unassisted study, I have not attempted to settle a question which is often discussed, between lectures and recitations as a mode of teaching law. And it may strike one with surprise that the whole subject of lectures should seem to be so unsettled as it might appear to be, by reading what has been written upon it, especially in its application to the education of a lawyer.

It can only be accounted for by the different points of view from which the subject has been regarded by different writers. Thus we are told that Mr. Justice Bailey, of the King's Bench, deprecated even treatises of any kind for a student. He would have him "read the cases for himself, and attend to the application of them in practice."¹ Mr. Warren, in his popular work on "Law Studies," advises a young man to enter the chamber of a pleader who is practising his profession, and is willing to act as his tutor, "who pursues a daily course of consecutive reading, commenting, as he goes on, and, by all means in his power, connecting its topics with the actual business of his chamber."² And as for lectures, he is of opinion "that these are of but little practical utility, at any stage of his studies, to a pupil who has the opportunity of attending at a pleader's or barrister's chambers, with such daily prelections as we have been speaking of, and access to a good library."³ On the other hand, an able reviewer, while speaking of this work of Mr. Warren, expresses the opinion that "this copying propensity seldom makes a great man; and, which is worse, it causes the small intellect of moderate men to slumber." And he concludes: "We hold, therefore, to the scheme of the law school, — to the call for more numerous lectures, to the invitation for the formation of classes, to the tutorage of students in standard works, to the crucible of public examinations."

¹ Warren, *Law Studies*, 185, *n.*

² *Ibid.* 185.

³ *Ibid.* 189.

Nor is it to be wondered at that Mr. Warren should not have thought very highly of lectures as a means of communicating full and accurate knowledge upon any subject of the law, if he borrowed his notions from what he tells us of the lectures of Mr. Amos, one of the professors in the London University. "Only think," says he, "of the following fearful summary of the topics discussed in a single lecture of Mr. Amos. It is extracted from the authorized published copy." And then he proceeds to enumerate more than fifty different subjects which were to be embraced in one lecture.¹ The fact that both Blackstone and Kent taught law by the means of lectures, and that those of the former still hold so prominent place in the process of legal education here and in England after the lapse of an hundred years, seems to settle the question of their being, if properly conducted, valuable auxiliaries in enabling a student to possess himself of elementary principles, and to read and apply with increased interest and advantages the subjects which are thus taught.

One difficulty in applying the same system of elementary training in England and our own country consists in the division of the profession into classes, which exists there, but does not prevail here. The attorney never acts as barrister there, and the line which separates the departments of the barrister in the common-law courts from those of courts of equity is practically nearly as distinctly drawn. A preparation for one is at best but an indifferent preparation for the other ; whereas here,

¹ *Law Studies*, 189.

as I have already had occasion to say, whoever enters the bar is assumed to be fitted to perform the functions of attorney, barrister, pleader, and conveyancer indiscriminately. To return to the subject of lectures, we have, to offset against these notions of English writers, the example of the universities on the Continent; though even in these I should infer the rule was not uniform. I was told by one of the professors of law in the University of Athens, where they have a class of three hundred law students, that he adopted the plan of recitations; but the professor of Roman law in the University of Berlin, to a similar inquiry, expressed a decided opinion that lectures were the only form by which the subjects he had in charge could be successfully taught. Dr. Marquardsen, one of the professors of law in Heidelberg, writing upon this subject, says: "Lectures, not lessons, are given by the professors; and, as far as theoretical instruction goes, that intimate relation which exists between the English special pleader and his pupil, is wholly unknown in the German universities."¹ I only need to repeat that the mode in use in the law schools of the empire was by "recitation and exposition," to conclude that out of the two something like a safe and expedient course may be arranged.

7. As to much that is expected to be learned in the curriculum of a legal education, I suppose it would be impracticable, if not absurd, to commit the contents of the text-book so as to recite them memor-

¹ 14 Law Rev. 385.

iter. Mr. Warren tells us of a student who did this in respect to the portions of Blackstone and Coke upon Littleton which treat of Knight Service, Homage, Fealty, Escuage, Wardship, and Escheat; which must have formed a heavy load of mere dead lumber upon the brain, instead of giving it either vigor or activity. Nor do I suppose any one, even if there were time to do it, would think of studying the several subjects of real property to be repeated by rote. In that, as in several other departments of legal science, the most that a student can hope to do, even if more were desirable, is to collect and digest the material parts so as to assimilate and retain the principles in his mind, to serve as materials of knowledge which he may have occasion to use and apply as occasion may require. It is, indeed, true, as I have before had occasion to say, that memory is a most important faculty for a lawyer. But the memory which he wants is not that which lays hold of and treasures up isolated facts, while it fails to regard them in their relations to other facts, or to perceive the inferences which are to be drawn from comparison of these facts. Many a mind can call up, at will, any given number of chronological events, without ever having wrought them into history, or deduced from them a single elementary truth. The training which a lawyer wants is one by which facts can be readily gathered up and associated with principles, thereby systematizing knowledge and putting it at his command whenever he desires to use it.

In order to remember a statement from reading

or hearing it, it must have been retained long enough in the mind, by an act of the will, to leave an impression upon it; which implies a voluntary effort on the part of the student, if he would profit by it in the way of knowledge. Now, the difficulty with most students at beginning is, that they do not understand what the parts which they read or hear are, which they should make this effort to retain. And this is as true of law as of any other department of knowledge or science; and one important part of a lecturer's duty should be to render them this service. He not only tells the student what to read, but helps to illustrate and explain what he finds in his books, by presenting the matter in a new light, or developing more clearly the principle which the author is attempting to establish. And in this way he helps to fix in the memory of his pupil whatever it is important for him to treasure up as knowledge. I have no doubt this is true of a large proportion of students in reading the law of real property, or contracts, or equity, or torts. But some subjects require a more thorough and specific mode of study than this,—something which shall fix what the learner wishes to acquire, more precisely and accurately in his mind than what answers to a philosophic memory. It requires principles to be supplemented by a precise use of terms, and an accurate knowledge of the rules by which they are applied. When such is the case, a lecture is not sufficient: it requires repetition and reiteration in the student's mind, till he gains full possession of what he is learning. Recitation becomes in such a case the best medium of

teaching, if it is discreetly employed ; because it tests the accuracy of the student's understanding and recollection of what he has been studying, and helps him to call up at will the specific rules and formulas by which the principles which he has stored up are to be applied. This, I apprehend, is true in learning the technical forms of pleading, as well as many of the rules in evidence. They cannot be made too familiar. Daniel Webster used to say that he learned pleading by translating the forms in "Saunders' Reports" from the original Norman French into English, and thereby making himself master of the precise phraseology of the several declarations and pleadings which are found in that work ; so that he was never afterwards at a loss to draw a special plea without resorting to a book of forms. It was not a drilling by way of question and answer in a recitation, but it was quite as rigid a measure of discipline, inasmuch as he was his own teacher. While to this extent recitation, as a mode of instruction, may be valuable, it is obvious that the want of time on the part of the student must restrict it to a very few of the subjects of which he is required to know something, in order to fit him for the bar. I have not touched upon the objection to recitations which some might make against requiring them of students supposed to have passed that period when they are considered necessary in the way of discipline and teaching how to study, but to which Dr. Marquardsen alludes when speaking of this kind of examination, as applied to lectures, in contrast with the final and general examination to which the student should be subjected on completing

his course. "How far it would suit the taste of the English student to be examined in the course of the lectures by the professor, I do not know; but in Germany such a thing would be impracticable, as our students would consider themselves treated like schoolboys. Leaving alone the question of academical honor, the greatest objection seems to be that no real good could be obtained by such an examination, which should test the memory only; whereas an examination suitable to the subject and student's age ought to prove how far the young lawyer has really mastered his science. Such an examination can only be held after a student has passed through a regular course of education."¹ And we come back to the point at which we started,—that this preparation may best be accomplished in a well-conducted law school, by a judicious and discreet course of reading, supplemented and aided by lectures, and, upon a few subjects, recitations.

8. This gives rise to two other questions which it is desirable to solve. Of what books shall this course of reading consist? and in what part of his three years' novitiate, if we fix it at that, shall he attend a law school? These are difficult questions to answer in general terms; partly because of the difference there is in the condition of different students, and partly because of the multiplicity of books, and the different estimate in which they are held. Besides, there are so many different theories upon the subject, and so many of these are based upon

¹ 14 Law Rev. 391.

what a student's preparation ought to be, rather than what so many are obliged to content themselves in making it. Then, again, some writers upon the subject have a weakness in affecting learning, and, in recommending books for others to read, make it a means of showing their own erudition. Sometimes it is even worse than that; and Mr. Bishop, in his "First Book of the Law," gives an account of one of these learned Thebans who take it upon themselves to advise the student what to read and when to read it; who in this case strongly recommended a work on the law of husband and wife, which, unfortunately, never had any existence, except in the brain (a kind of *scintilla juris*) of the intended author, whose name had been published.¹

For my own part, I should much rather leave the selection of books, and the order in which they should be read, to the judgment of the student, under the advice of a competent instructor, than to undertake to direct his choice, in view of the new works which are appearing from time to time. The fathers of the law will always hold a prominent place among the books which every lawyer would wish to have in his library; but the time has gone by when Finch or Coke are read as a part of a student's initiatory course. I forbear to speak of the multiplication of books upon almost every conceivable subject in the law, and the frequent changes consequent thereupon in the programme of studies which students are, at times, induced to make, except so far as it may be a reason

¹ § 313.

why I do not follow the example of others, and undertake to prescribe for a student the works which he should read.

9. But as to the method of his reading I feel called upon to say a single word. So much of a young man's success in life depends upon the habits he early forms, that even as a student his progress is promoted or retarded, in no small degree, by the manner to which he accustoms himself in the reading and studying of books. If he has his regular hours for doing this, he will find his mind, in a short time, adapting itself to the regular work imposed upon it, and ready to take up its task whenever the time has been reached at which it is to be done. And if, for this purpose, he will divide the day into regular periods, and assign to each a certain portion of the duty he has to do, whether it is work, rest, or recreation ; and if he will pursue this course till the mind has got accustomed to it, — he will find that it not only readily falls into this orderly arrangement, but that these successive changes bring with them a sense of freshness and relief which give positive pleasure. Labor, in that way, ceases to be irksome, and brings with it its own rewards. But in making this division of time, it should be so arranged as not to weary the mind by too long a continuous strain. When that is done, the very purpose of study is defeated. The mind grows dull and inactive. Attention flags, and ceases to supply the memory with its material for reflection. But all this may be obviated by making the

changes in the kind and character of the work imposed upon it sufficiently frequent to avoid this over-taxation of its powers, provided it be in something like a regular and orderly sequence. Comparing the mind with the body, these changes in the exercise of the powers of the one are like those in using the muscles of the other. Everybody knows that a man may travel longer, and with less fatigue, along a road in which there are alternate ascents and descents than along a dead level. The muscles he uses in going up a hill are relieved and allowed to rest while he goes down upon the other side. Let a student, therefore, set apart, we will suppose, two hours in the morning to a close, undivided study of the law of real property, and then lay it wholly aside. Let him then take up a work on contracts or torts for another two hours ; and then, dropping dry technical law, read for the next hour or two some work on history or literature, or some essay or review, which, while it adds to his general knowledge, disciplines his taste, or calls into exercise his reason and his judgment. If he will do this as often as his mind begins to grow weary, and repeat it at something like regular intervals, day after day, till it becomes a *habit*, he will be surprised to find how much, and with how great profit, he can study, and with how little sense of fatigue it may be done. On the other hand, the shifting of one book or one subject for another to suit a present whim or feeling of irksomeness, instead of helping to strengthen the mind, tends rather to dissipate and weaken its powers ; and this tendency grows by indulgence.

10. The question is sometimes started as to the point of time in a student's course at which he should enter a law school, provided he should conclude to avail himself of the aid of one of these. Here, again, so much depends upon the circumstances of each particular student, that it is difficult to answer this satisfactorily, as to all. It is to be remembered that there is no proper starting-point in studying the science of the law ; so there is no point in its study at which it is to be assumed that the student has got by or in advance of certain subjects or classes of subjects, so that it is too late to take them up to advantage because he has left them behind in his course. There may be good reasons why one should study the general principles of the law of contracts before he takes up the subject of insurance or bills of exchange. But there is nothing in the nature of things which should require a student to postpone a separate and distinct topic, like real estate, to that of torts, although there is a general order to be pursued which it is well to observe. A student, therefore, who should enter a law school after having read law by himself or in an office for six months or a year, has no reason to apprehend that he has lost an opportunity to avail himself of its teachings with profit and advantage, even in matters to which he has already devoted attention. And I may add that one can hardly fail to derive some benefit from the instructions he may obtain in a law school, in whatever period of his novitiate he may join it. And while I do not subscribe to the doctrine that a student can in any school "com-

plete the entire course of instruction," as some promise, in thirty-six weeks,¹ I have no doubt he may in that time derive decided advantage from its teachings. In most of these schools there is a prescribed course of study calculated to occupy a certain length of time. In that of Harvard and some others, this covers two years. But every one knows that the beginner is embarrassed in starting, from not understanding the subjects of which law treats, or the terms made use of in conveying instruction upon them. The first step, therefore, for him to take, as in all technical sciences, is to learn definitions, and what the meaning is of the terms through which instruction is to reach his mind. Before this has been done, his progress must necessarily be slow, and the lectures he hears will convey but an imperfect idea of what they are intended to teach. Here, then, a question presents itself, whether the time required to learn the subjects and terms of the law can be most profitably spent before or after entering a law school; and the answer, it seems to me, depends upon how much time the student can spend in such a school. If he can go through a course of two years, he can acquire the rudiments of the science so much faster there than elsewhere, that it seems clear that he should begin it in the school. But if his means or circumstances preclude his remaining beyond a portion only of the two years, it is probably equally clear that to gain the most that he can in a given time from the lectures and teachings of the school, he had better postpone

¹ See Bishop, First Book, &c., § 193.

his attendance upon these till he has surmounted, in some way, these early embarrassments in the way of his progress, so far, at least, as to have gained a knowledge of the terminology of the law.

11. I have been often asked how many hours in a day a student should study, and how many pages in a given book he should read. But here, again, the answer must necessarily be general, and in a measure hypothetical. Much depends upon the health and habits of each particular student, upon the book he is reading, and the state of mind he is in. Some books are written in a clear and orderly manner, so that the student easily, and at once, understands the meaning of the author; while others require almost as much attention to the words and their arrangement, in order to reach what the author intends to say, as it does to follow out the processes of solving a mathematical problem. And then the temperament and habit of students, as to reading slow or fast, vary about as much as the rates at which they move in walking. I know it is common for writers upon these subjects to indulge in theories and speculations drawn from their own experience. Some have grown enthusiastic in praise of beginning the day's work with the lark, who never saw the sun rise in their lives. Lord Coke and Sir William Jones seem to have been influenced in their respective conclusions upon the subject by the terminal words of the metrical stanzas in which they enforced their notions of the proper number of hours for a student to be occupied in a day. With one "six" was found

to rhyme with "fix," while the other seems to have adopted "seven" as properly corresponding with "heaven." Other eminent jurists have varied in their maximums of time from four to eight hours or more in a day. Each student, at last, must be his own judge of how much he can do; and it only needs that he should be honest with himself to come to a better conclusion of what is right and proper in his particular case than any rules which others may prescribe for him. Let him watch the operations of his own mind; and when he finds his eye running over lines and paragraphs without leaving a definite impression which the memory can recall, and he cannot, by an effort, put his faculties into working order, he ought to understand that his mind is weary, and needs the rest of quiet or change. It is for this purpose that the changes of which I have spoken are intended; but for how long a time he shall confine himself to the one or the other of his subjects, he must judge from his own experience and observation; and the experience of others can only serve as a caution or a hint to aid him in the judgment he is to form. If he can study four or five hours a day to profit and advantage, to begin with, it would not be extravagant to assume that he might, after a few months, extend this to six or eight, without any special or extraordinary effort. And even then, after giving a liberal portion of the twenty-four hours to sleep—which may be set down for most persons at eight hours—and sufficient time for the recreation which health requires, and for the social duties which keep him from becoming a

recluse, he will find, every day, broken hours and scraps of time, which life is too short to throw away ; and which may be turned to account in such miscellaneous reading of the current news and literature of the day as will help to give grace and flexibility to the more staid and severe parts of his education, and be made a means of cultivating the personal qualities which help to make the complete man.

LECTURE III.

STUDY. — *Continued.*

1. Reading Treatises or Reports. — 2. Moot Courts and drawing Opinions. — 3. Commonplace Books. — 4. Culture, other than in Law. — 5. Acquiring and Use of Language. — 6. When and how to learn Practice. — 7. Study of Statutes. — 8. General Reading. — 9. Time required to fit for the Bar.

1. PASSING now from the number of hours during which the student should be engaged in study, to the kind of books to be read by him, a question arises, Shall these be elementary treatises, or volumes of reports, or both together? I put the question in this form, because there are respectable writers who insist upon a much more extensive study of reported cases than is generally adopted. In order to answer this inquiry, we are to keep in mind that in his preparatory studies a student has two purposes to be answered. The first of these is to treasure up, in a clear and intelligible form, the principles of the law for future use; and the other to discipline, strengthen, and give activity to the powers of his mind generally. And with most young men it is an object to do this in the briefest time consistent with ultimate success. For the rapid acquisition of elementary knowledge by the simple effort of attention and memory, it hardly needs an argument to show that the readiest way to do this is by good elementary

treatises. It should be the very purpose of such treatises to state principles in a clear, orderly, and distinct manner. It should be, moreover, the business of the writers of these to gather up, classify, and explain these principles, which lie scattered through the volumes of statutes and reported cases, wherein they are enunciated and applied. But to do this well requires not only the diligence which a student may bring to the work, but a greater breadth of learning and a readier power of analysis than ordinary students can command. The study of particular cases, for new beginners, can hardly fail to confuse and distract instead of informing the mind. As found in volumes of reports, the cases are generally made up of facts more or less complex, the importance or bearing of which is not often apparent. The points to be settled are not at first obvious; nor is it always easy to separate the reasoning and illustration applied by the court in reaching a conclusion from the conclusion itself: and in that way the student often rises from the study of a case with vague and indefinite notions of what, in fact, has been decided by it; and he is thereby in danger of failing to possess himself of the principle which it is intended to illustrate or establish. And what, perhaps, is quite as important, if he succeeds in bringing out the point settled clearly in his own mind it is like a single fact in philosophy, which, however important in itself, fixes no law of science until its relations to other facts have been ascertained. And the learning of a lawyer does not consist so much of a knowledge of

principles as of the relation which these hold to each other in their general application. Mr. Bishop, in his "First Book of the Law," has put this matter clearly and wittily when he says: "There have been before our days men who have objected to such text-books as were clearly and accurately written, on the ground that they made the study of the law too easy, whereby the student failed to get sufficient legal training and discipline; but the new patent, it is seen, is based on the opposite view of the subject. According to the new doctrine, the quick way to get a house, for instance, is, though you have money, not to buy any thing or hire any labor, but to go and cut your own timber, and do all the work with your own hands."¹ My own conviction upon the matter is, that a student had better trust to the statement of what has been decided, as it is laid down in an accredited text-book, than attempt to do it himself, until he shall have got a pretty definite idea of the subject to which the cases he is to examine relate; unless he may have occasion to refer to some particular case to discover the grounds and reason of any particular proposition that he finds laid down in the book he is reading, and which needs explanation. In the next place, when he has become ready to study particular cases to advantage, instead of taking them up one after another, as they are found in a volume of reports, he had better read them in connection with the treatises in which they are cited; as he thereby has a principle of association and relation between them to fix them more clearly

¹ § 195.

in his mind, and they are thus made to correct or enforce each other, or to show wherein cases conflict with or limit one another. If, for example, he were to read the report of *Wain v. Walters* in "East's Reports," he would naturally suppose he had ascertained what the rule of law is in all like cases; whereas, had he studied the subject to which it relates in *Browne on the Statute of Frauds*, he would have found that in the case of *Packard v. Richardson* an entirely different rule is enunciated and adopted in several of the States.¹ The learning how to read reported cases with ease and advantage is, indeed, a part of the requisite training of a student. But, as I have already said, the best time to do it is after he shall have made considerable progress in understanding what law is, and the elements of which it is composed. And when he does undertake it as a task, he should take up the cases in classes, as they are associated by the subjects of which they treat; in some such manner as is suggested by the admirable plan of "Leading Cases," left by Mr. Smith as a monument of his learning and sagacity. To attempt to do it in any other way seems little better than endeavoring to span chaos itself, when we remember that we have already over two thousand volumes of reported cases in the United States,² independent

¹ 5 East, 16; 17 Mass. 12; *Browne, Stat. of Frauds*, §§ 389-391.

² The number of volumes of the published law reports of the courts in the United States, and of the several States and Territories, it is stated, amount in the aggregate to 2,013. The number to each State is as follows: New York, 348; Pennsylvania, 139; Massachusetts, 102; South Carolina, 83; Louisiana, 72; Maryland, 72; Kentucky, 68; North Carolina, 63; Virginia,

of the formidable array of English reports, running back more than five hundred years. And if, instead of these, it is proposed to content one's self with digests of the cases they contain, the student would be nearly as much at a loss to reconcile the disconnected and often apparently discordant groups of independent propositions which he would there find, as to frame an harmonious system out of the original cases themselves. The nearest approach that we can hope for to such a system is for able, clear-headed, and discriminating writers to treat of separate subjects by themselves, by collecting whatever is settled and decided as law upon them, and, through the alembic of their own individual brains, extract the essence of these in a simple and homogeneous form, and then to embody this in plain and intelligible language. Treatises formed upon this plan are what the profession needs, as well for the student as the practitioner. And it is lamentable that so many of the so-called elementary *treatises* rise so little above the character of a crude digest.

Before closing what I have to say of reading, I ought to notice a class of law literature which is found in the periodical works that have become so

63 ; Alabama, 62 ; Maine, 56 ; New Jersey, 52 ; Illinois, 50 ; Vermont, 50 ; New Hampshire, 47 ; Tennessee, 46 ; Missouri, 45 ; Mississippi, 44 ; Connecticut, 43 ; Georgia, 43 ; Ohio, 43 ; Indiana, 40 ; California, 37 ; Texas, 32 ; Iowa, 31 ; Wisconsin, 29 ; Arkansas, 25 ; Michigan, 22 ; Minnesota, 14 ; Florida, 12 ; Rhode Island, 7 ; Delaware, 6 ; Kansas, 5 ; Nevada, 5 ; West Virginia, 3 ; Oregon, 2 ; Idaho, 1 ; and Washington Territory, 1. The number of volumes of reports of the courts of the United States number 150.

numerous of late. They are in a measure to the lawyer what the newspaper is to the politician and the man of business, — made up partly of elaborate and valuable essays and criticisms, and partly of digests and notices of current decisions, and the events which make up the life of the bench and bar. Such reading as this may be turned to excellent account in keeping the mind from stagnating, when it is for any cause indisposed for hard labor; and no lawyer can afford to be without his periodical.

Thus far I have been considering law schools in their connection with the means and inducements they offer for reading books, hearing lectures, and cultivating the social habits and qualities of the student.

2. There are one or two other advantages they offer in the way of training and instruction, which ought not to be lightly passed over. The first and perhaps the most important of these is the means of discipline and improvement which they offer in the moot courts, that are established in most, if not all of them. Conducted as they are according to the forms of the courts of common law, they serve the double purpose of accustoming the student to the modes of judicial procedure, and thereby relieving him from much of the awkwardness to which he is otherwise subject upon his first entry upon practice in the courts, — while it accustoms him to examine points of law, and the authorities on which they rest, with accuracy and careful discrimination. Another important habit which they directly tend to

cultivate is that of self-possession, and quick and orderly arrangement of thought, in requiring the student to make up his own opinions from his own investigations, and then maintaining and defending them against the attacks of an adversary. Nor do I believe there is any one exercise in these schools from which a student is so conscious of deriving improvement in forming and expressing opinions upon subjects that require thought and reflection, as the preparation and conduct of a case in one of these moot courts. The student must not only be able to elicit and maintain the strong points of his own case, but to anticipate and meet the points on the part of his adversary. To do this calls for the study of cases as well as elementary treatises, and that keen and careful analysis which he will find so useful and important as a habit, when he comes to the actual business of preparing and managing causes in court. And I have no doubt he may in this way start in his practice, when admitted to the bar, months, if not years, in advance of one who, with equal talents and industry, has had no other training in this respect than what he gets in an office, or in studying by himself. The advantage of the law school consists in this, that while the ordeal by which he is tried in making his early efforts is by no means slight or inconsiderable, the consequences of a first failure are far less formidable than they would be in an action in court; and it brings with it far less of discouragement than to break down from embarrassment or want of self-possession at the expense of a client, and in the presence of a jury, before

whom he is quite as much on trial as the party he represents.

I would not have said so much upon this point if I did not know the truth of what I am saying ; for I know no situation which is more trying to a sensitive young man, unaccustomed to such things, than to undertake the management of a cause in court with an anxious and excited client on one side, an eager and perhaps experienced antagonist on the other, ready to interpose every obstacle and take advantage of every slip, with a jury curious to hear what he has to advance, and a judge who must apply the same rules to him as if he were master of his own position ; while he has to stand alone, feeling every moment as if a failure would be fatal to him. Nor is the case a singular one where a young man goes through his first cause in court as a soldier does his first battle : and the only reason why he does not give up and run away is because he is afraid to do so. And yet let me impress upon you not to be disheartened or discouraged. If you have prepared yourselves somewhat in these courts, you will find less cause for embarrassment. But even if you have not, you have only to persevere for a few efforts, to be reasonably sure that you will gain that confidence and self-possession which come with familiarity with the scene, and a repetition of the steps and processes by which causes in court are conducted.

While moot courts are such powerful aids in teaching a young man how to acquire and use the knowledge he is seeking, I ought not to omit mention of

an exercise which has been adopted in some of these schools, of a somewhat similar character; in which the student is required to draw up, in proper form, opinions upon questions submitted to him for examination, which serves to cultivate a legal habit of thought and investigation, and to form and make use of a clear, precise, and accurate style of composition, so desirable in a judge or a lawyer in stating and enforcing propositions. But, to give either of these exercises their full value, the cases selected for argument or written opinion should be of sufficient difficulty and importance to tax the skill and ingenuity of the student, as well as his diligence and power of investigation and analysis. They have, in that way, many of the advantages of debating societies in acquiring ease and grace of elocution, while they train the mind to habits of severe thought, and accustom it to processes of close reasoning and sound logical deduction, which every successful lawyer has to acquire in some form. Nor are these moot courts the inventions of modern law schools. They are almost as old as the study of the common law. Mr. Bishop quotes from Fulbeck, who wrote in 1599: "Gentlemen, students of the law ought, by domestical moots, to exercise and conform themselves to greater and weightier attempts; for it is a point of warlike policy, as appeareth by Vegetius, to train young soldiers by slight and small skirmishes for more valorous and haughtly proceedings."¹ And as for debating societies, their utility, when properly regulated and

¹ § 409.

directed, has too often been illustrated in the lives and experience of distinguished orators and advocates, to need any labored commendation when speaking of the means by which a young man may develop and bring into exercise the powers and faculties that need to be trained in order to be actively efficient.¹

I ought perhaps to say a single word of other exercises that are sometimes resorted to in these schools to aid and advance a student in his course of preparation,—such as drawing declarations and pleas, and forms of deeds and contracts, under the critical examination of a judicious teacher. But my object is not to go into detail in these matters, further than is necessary to give an idea of the mode in which the processes of a legal education may be best carried out; leaving it for others to adapt them to the wants and condition of the student who is to be taught by them.

3. I have been asked at times how far it is advisable for a law student to make use of a common-

¹ The biographer of Lord Mansfield tells us that “during his novitiate he was in the habit of attending a debating society, the discussions of which were exclusively confined to legal subjects; and his arguments were prepared with so much care as to be frequently serviceable to him in after life, not only when at the bar, but when he presided in the Court of King’s Bench.” 4 Law Mag. 325. The aid derived by Francis Jeffrey from his connection with the “Speculative Society” of Edinburgh, and by Curran from the society, with rather an unclassical name, in the Inner Temple, in which he first broke through the restraint and reserve that had hitherto shut his mouth whenever he attempted to speak,—are among the familiar anecdotes of the lives of those eloquent advocates.

place book in his reading, and what should be its form. And although much has been said and written on this subject, I propose to dismiss it with a brief notice. Of the utility of commonplace books, if judiciously used, I have little doubt, while at the same time I am equally clear that they should be used sparingly, and for special purposes only. If employed to do the work of memory, they are positively mischievous. It often aids one in getting a clear conception of a proposition which he is desirous of fixing in his mind, to sit down and analyze it, and then write it out in his own language. As words are the media of thought, one must put his thoughts into the form of words before he can be in full possession of them ; and it often enables one to master a complex proposition, especially when stated in unfamiliar terms, to restate it in his own phraseology. Used in that way, a note of what one has read upon some particular subject may help to fix it in his memory. So one often comes across things in his reading which are new and worth preserving, but do not come into any orderly classification with the subject-matter of his study, and are to be remembered, if at all, as isolated facts,—such as dates, names, anecdotes of distinguished personages, quaint forms of expression, and the like. By noting these in a commonplace book he is often able to find what he wants for use, as occasion requires, when otherwise it might be beyond his recall. But it is an entire mistake to suppose that writing a thing in a commonplace book is helping the memory to treasure it up as a part of one's knowledge. The memory soon

grows content with knowing that the thing is safely laid up in such a book, and will not trouble itself to keep charge of it any longer. And the consequence is that a memory thus dealt with loses its tenacity and grows weak, just in proportion as it is accustomed to remit its efforts to retain what is committed to its charge. The human memory has suffered untold mischief by the quackery with which it has been treated through the nostrums of mnemonics, by which it is worked, like Babbage's computing machine, by something like an outside crank that anybody can turn. If such a thing is possible, it does violence to the laws of psychology; and if one would remember a thing as subtile and abstract as much that comes under the head of legal science, it requires that the mind should lay hold of it and retain it long enough to digest it, till it enters into the substance and material of what we call knowledge, and is brought into use in the production and activity of thought. And this it will rarely if ever do, if what is read is committed to the keeping of a commonplace book.

4. I have thus far chiefly confined these remarks to law and its specialties, when speaking of the training and discipline of a student. But I would not be understood as ignoring for a moment or undervaluing learning in other forms, or that broad and liberal culture which characterizes the scholar whatever department of knowledge he may pursue. It would be as inconsistent for a law student to do this as it would be for a man, who

was ambitious to cultivate the habits of a gentleman and a man of the world, to devote his time to developing his physique by exercising in a gymnasium, while he neglected that culture which grows out of associating with gentlemen and studying what belongs to good society. Our society here is so made up that no one can fulfil his proper mission in life, with honor to himself or usefulness to others, who aims to be a mere lawyer and nothing else. Nor can he reach the highest point of eminence or distinction in the profession itself, who has confined himself to the study of law as a pure and abstract science. A man who hopes to exert power or influence in a community like ours has several parts to act; and of no one is this more true than of the lawyer. To say nothing of other branches of science, of which he must know something in order to prepare and manage cases in court involving the application of such knowledge, he is — from the position he holds as a member of a liberal profession, and the connections and associations into which he is thereby brought — in a condition to exercise an influence and control over the opinions of others, and to make himself felt as a power in the community, although it may be done all unconsciously on his part. And though he pursues the law with ever so commendable a diligence, he cannot stand wholly aloof from politics, nor escape some of those thousand and one occasions, from the dinner-table to the caucus room, where the people insist upon being entertained by a speech. While, therefore, I do not advise a young man to shape his education with refer-

ence to making himself a stump orator or a man of fashion, I cannot help seeing, in the condition of our country, there is a necessity that a lawyer, who would take the position among his fellow-citizens which the public are disposed to award to him, should know something of history, general literature, and the laws of social science, and should be more or less familiar with works of taste and imagination; and that his education should be conducted in reference to these as well as the technicalities of his particular profession. Unless he does this as a student, there is danger of his losing the requisite tractableness and facility of acquiring them later in life, from the habits of his mind becoming fixed and rigid, like the muscles of his body, which, in middle life, lose the ease and flexibility of youth. Nor is it necessary, in order to accomplish all this, that the student should sacrifice a single moment that belongs to the specialties of his education. If economically as well as systematically used, there is time enough for law and literature too; for the work of study as well as its pastime; for the training of the lawyer and the culture of the gentleman. All that is necessary is that neither shall be allowed to trench upon the hours or parts of hours which belong to the other.

I might, perhaps, speak in this connection of the intimate relation there is between municipal law as a system and that of ethics, and in so doing urge upon the student the importance of making both a part of his education. But the time allotted to an education is necessarily so brief, that he is all but

compelled to postpone the one till the other shall have been in a measure secured; when the moral dignity and manliness of ethical science should be added to the vigor of sound learning, and the æsthetic grace of elegant literature. I shall therefore postpone what I may find occasion to say upon this subject until I come to speak of what a lawyer owes to his own mental and moral health, and how far his own personal happiness is connected with the cultivation of a taste and fondness for literature as a relief from the tedium and toil of a busy and sometimes overworked professional life. And lest I may not find time again to resume the subject, let me here quote the language of Mr. Choate, the force of which many have felt, without the power of giving so strong an utterance to the thought: "Let the case of a busy lawyer testify to the priceless value of the love of reading. He comes home, his temples throbbing, his nerves shattered from a trial of a week, surprised and alarmed by the charge of the judge, and pale with anxiety about the verdict of the next morning, not at all satisfied with what he has done himself, though he does not see how he could have improved it." — "With a superhuman effort he opens his book, and in the twinkling of an eye he is looking into the full 'orb of Homeric or Miltonic song;' or he stands in the crowd breathless, yet swayed as forests or the sea by winds, hearing and to judge the pleadings for the crown; or the philosophy which soothed Cicero or Boethius in their afflictions, in exile, prison, and the contemplation of death, breathes over his petty cares like

the sweet south; or Pope or Horace laughs him into good humor; or he walks with Æneas and the sibyl in the mild light of the world of the laurelled dead: and the court-house is as completely forgotten as the dreams of a pre-adamite life. Well may he prize that endeared charm, so effectual and safe, without which the brain had long ago been chilled by paralysis or set on fire of insanity.”¹

5. There is one branch of my subject of which I ought to speak more in detail than I have hitherto done; and that is, how one can best and most effectively make use of what he may be supposed to have acquired by the various modes of which I have been speaking. I do not intend by this how he may make the most money, or win the most popular applause, or turn it to the best account in securing office. These should, at best, be but secondary matters with a lawyer of high and honorable aims. The object aimed at in his training and education is, how he can best bring his learning to bear upon the minds of others, in enlightening and controlling their judgments and influencing their wills. His business is to be with courts and juries; and the force and extent of the power which he is to exert over these depends, in no slight degree, upon the manner in which he addresses himself to their reason and judgment, as well as by the matter by which he seeks to influence them; so that, as every one knows, it often is not the amount of an advocate's learning that measures his power in court,

¹ Choate's *Life*, 477.

so much as it is the mode in which he uses what he possesses. I shall not attempt to analyze or explain how it is that one man, while addressing an audience, can hold and keep their attention and interest awake, where another, with equal or greater learning and logic, will put them sound asleep. It is much easier to settle the fact than to ascertain the process or formula by which such inequality can be remedied and corrected. Some men seem to have a "gift" of language, and never want for words to clothe, it may not be always ideas, what they want to say; while others, with knowledge and ideas enough to supply any amount of declamation, are silent because they have no words in which to express themselves: their ideas crowd each other as they come out in the form of words, flowing, if at all, in a broken current and without orderly continuity. There is in every effective orator a magnetic power over his hearers, which others utterly fail to command.

And it is because of this diversity in the capacities of different men who have been trained and educated in the same school, as well as of that wonderful power which true eloquence always holds over the minds of men, that one of the earliest questions which the law student puts to himself is, whether he will be able to "speak well," if he gains admission to the bar, or, in other words, address himself with effect to the judgment and good sense of others. Nor is it by any means an easy question to answer. On the one hand, there is danger that he who has great natural facility in a command of words may content himself with a mere fluency of speech,

and fail to carry conviction or persuasion by the force of his language or the pertinency of his illustration ; on the other, the case with which a reasonable command of language may be acquired ought to encourage every one to make the attempt, however adverse the circumstances under which it is begun. There are few powers in a young man more susceptible of being educated by care and perseverance, provided he has a reasonable store of learning and good sense, than that of thinking and expressing his thoughts in a clear, orderly, and convincing form ; so that, while the fluent man may have to be checked, the timid and self-distrustful one should be cheered and encouraged to make the effort to overcome his hesitancy of speech, or confusion of thought.

If it is asked, How are two such opposite processes to be carried out in the same school ? I should content myself with answering it by a few practical hints. And, in the first place, I would have a student get a clear conception in his own mind as to what he should aim at in this matter of addressing others. Let him understand that the power of making a speech is not an *end*, but a *means*. As a lawyer, he is not to get his living by amusing and entertaining others with the flowers of rhetoric and the graces of elocution, but by convincing their judgments and persuading them as to what they are to do.

A judge or juror, when seeking to get light upon a matter which appeals to his perception of truth or his sense of right and duty, would gladly exchange the finest flight of fancy in an advocate for one good,

sensible argument, though couched in the homeliest phrase, and delivered without one attempt at grace in its manner. But whoever would impress ideas, or sentiments, or feelings, upon others, must have them himself, or at least be able to borrow them for his special use. Words without ideas soon tire ; while, so long as one is able to communicate something new upon a subject in which others are interested, he will be listened to with interest, though he lack the attraction of manner or beauty of diction. If I were to advise a young man how he could most likely succeed in becoming an effective public speaker, or advocate in court, I should first advise him to train and educate the various faculties and functions of his mind, with a view to gaining knowledge. I would then insist upon his patiently and persistently endeavoring to lay up a stock of this commodity, and gather ideas from what he reads and hears and sees. Let him, in the mean time, accustom himself to some of the best models of English style, with a reference to plain, simple, and expressive language, and clear and comprehensive forms of expression. Let him bear in mind that, as a lawyer, he will have two parts to act and two lives to live ; and that he must, consequently, have two styles to cultivate and use,—one for the court-room, the other for the world outside of it. If in doing this he watches the operations of his own mind, he will find that so far as the use of language is concerned, the same rules of acquiring and applying it appertain to both these relations in which he stands to the rest of the world. He has not only constant

occasion to say something, but, to make himself understood, he must say it clearly and distinctly; and if he does not understand a thing himself, he cannot make it intelligible to others. In other words, to address an argument to a court or jury, he must go through the same processes by which he would seek to convince his neighbor, or stimulate to action a popular assembly.

As to how he shall get a ready command of apt and intelligible language in which to clothe his ideas or arguments, much may be done by cultivating good habits of style, by familiarizing himself with the works of the best English authors; not with a view of copying them, but of imbibing their tone and spirit, and, at the same time, becoming acquainted with the language and forms of expression which they make use of. Let him, in this connection, accustom himself to putting down his own thoughts in his own language upon such subjects as interest him, in the form of a composition or essay, and he would often be surprised at the greater ease with which he expresses what he thinks, and the wider range through which his thoughts expand themselves. These processes imperceptibly impress themselves upon the mind of a student in the same way as the habit of hearing and speaking correct language in families, as seen in the modes of conversation which the children of well-educated parents exhibit in ordinary life. And what is quite as significant, people thus educated find it just as easy to speak correctly as otherwise. The same principle, though in a less degree, would be found to obtain in the

education of one more mature, if he would as carefully and uniformly apply the same habits of holding converse with the best writers and speakers in their own expressive and appropriate language. It would tend, moreover, to give to the law student confidence as a ready debater, the want of which so often detracts from the force and effect of what really learned men attempt to say.

I postpone till a later stage of these lectures the consideration of what is necessary to the production of those grander and more impressive exhibitions of intellectual training and culture which are sometimes witnessed between the giants of the profession,—such as immortalized Erskine at the bar, and signalized the argument of Mr. Binney in the matter of the Girard will, and made the summing-up of Mr. Webster in Knapp's trial so memorable and so impressive. All that a young man upon entering the profession can hope to do is to present causes of no extraordinary complicity in a plain and intelligible manner; and to this extent he will at once be conscious of the benefits he will have derived, in preparing to do this systematically, from his training in the moot courts of a law school.

I have touched upon the subject of debating societies, and recur to them again to remind you of the form which these have taken in some of the law schools, whereby the rules of parliamentary law are taught and applied; and while opportunity is offered for cultivating readiness in extempore debate, the student learns how to conduct the business of deliberative assemblies.

In some or all of these ways, a student may hope to overcome the embarrassment of self-distrust which at first seems to stand in his way, and to enter at last upon the proper business of his profession with increasing zeal and confidence. Starting at that point, it is for him to carry on by himself the education which he has thus commenced, and to lay hold of the prizes that await diligence, learning, and fidelity in the course upon which he has entered.

6. I have hitherto purposely avoided entering upon one subject, which is so essential in a lawyer's education that I might consider it by itself; and that is Practice. The question is not whether it shall be taught, but how and at what time in his course. This, as it seems to me, may be best solved by a preliminary inquiry of what it consists. It is in part scientific, and in part mechanical. Some of its rules are technical and arbitrary, having their basis in principles that are purely scientific, and which lie deeper than the formulas in which they are presented to the mind of the student. To deserve the name of a lawyer, he should understand both these, in order to rise above the mechanism of his profession. Noble as the law is as a science, it may be degraded to a very low and contemptible trade. Not a few offer themselves as practitioners who have a very imperfect idea of the reasons upon which the forms they use are based, and are as apt to go wrong as right, the moment these forms require to be essentially modified to adapt them to a new state of things. We have, as you are aware, printed forms

of deeds and leases, which any one may purchase at a stationer's, and which almost any intelligent man may fill up and make to do their intended service. He will accordingly carefully insert the sum to be paid for a conveyance of land, after the words "in consideration," and fill up the blanks for "his" and "their" before "use" in the *habendum*, without the remotest idea why this is to be done, except that there are such blanks left to be filled. In such cases, the purchaser often relies more upon the accuracy of the printer who prepares the blanks, than of the so-called conveyancer who fills them up. I have, time and again, seen what was intended to be a mortgage of personal chattels written into a blank mortgage deed of land, with all the covenants usually contained in such deeds carefully retained; whereby the mortgagor not only covenanted that he was "seized in fee" of a horse, for instance, and would "warrant and defend the title" to the same, but binding himself thereby to the mortgagee's "heirs," as well as the mortgagee himself. The cheapness at which such deeds are usually drawn will probably sustain so hazardous a practice till the public shall be taught, by a sufficient number of examples, that cheap law is not always the best or the most economical. But what I have said of making deeds, by merely filling blanks in printed forms, applies to students undertaking to learn practice by copying papers and following forms in a practitioner's office, before they have learned the grounds and principles upon which these are framed. If, for instance, he were called upon to frame a deed, such as is ordi-

narily in use to convey land, and should use, among other words, that of "heirs," would he not, if he had never been taught the effect of that word in creating a fee, be as apt to use it if only an estate for life were intended, as he would the words "grant," or "to have" and "to hold," which have quite as potent a seeming as this little word without any special signification? He would find the same word in other blanks, such as bonds, for example, in which the idea of creating an inheritance is nowhere raised, and would need something more than copying it, though ever so often repeated, to suggest to him the purpose for which he should use it. I have confined myself to this simple illustration to show how important it obviously may become in copying forms of pleadings, bills in equity, wills, or contracts, for a student to know the force and application of the language or forms of expression which he makes use of, and by which alone he can go a step beyond the mechanical work of a copyist. And by this I mean to say that it seems to be all but indispensable for a student who wishes to learn practice scientifically, so as to prepare himself to apply its mechanism to new cases as they may arise, that he should be first indoctrinated in the meaning and effect of terms and phrases in use in the law, as well as the rules and principles upon which the forms of the law are supposed to rest. These naturally come within the proper scope of study in a law school, and the lectures or recitations by which the student may be aided therein. Both conveyancing and pleading are departments of the law having

their appropriate rules and principles. Treatises have been written to explain them, and a vast amount of learning has been devoted to making them plain. And unless these are to a considerable degree understood, many of the forms of pleadings once in use can, to common minds, be little better than jargon. How soon, for example, could a student, by learning to repeat the form of a special demurrer, be able to judge in what cases it might have been applied while the law dealt with such refined technicalities? Or what idea would he get, by copying special traverses, why he should say "without this that," rather than any other particularly awkward and seemingly insensible form of expression? There is, doubtless, much to be learned in the matter of practice as a science, whether it be in respect to the common-law forms, or those based upon statutory codes; but whatever this is, its principles and elements should be taught, like other branches of the law, by precept, illustration, and example, as something to be understood, remembered, and applied. With such a preparation, its mechanical processes illustrate and enforce principles, suggest new forms, and clothe the dead letter of precept with life and meaning. This reasoning, if well founded, would lead us to the conclusion that the time to learn practice is after the student shall have completed his course in the law school. And another reason would apply to students coming from different States, that the forms of process and modes of conducting the pleadings and proceedings in courts differ in different States. Some, like New York, have their own codes of practice, while others

retain the forms at common law ; and it would be little better than a waste of time for a student who is to practise in one State, to spend it in learning the code of practice of another. I would teach the student as much as I could of the doctrines and principles of conveyancing and pleading at a law school, or by private instruction ; but I would then select for him the office of some well-skilled, careful lawyer, who was in full general practice, and there train him by having him take hold of and do whatever might offer, till he has made himself familiar with the details of its business. In the mean time, let him read what he can, especially in the form of cases ; let him observe how business is done, how clients are dealt with, and cases are prepared for trial, and briefs for argument. Let him devote himself for six months or a year to such a training, and he would find the learning with which he started there, and had already acquired, so supplemented by what he has done and seen and heard in such an office, that he may honestly, and without misgiving, enter upon a profession whose honors and rewards he may fairly hope to win by a course of industry, fidelity, and honorable conduct.

7. In thus glancing at the several steps and processes by which it is assumed that a young man may fit himself to take his place at the bar, I am aware that I have omitted many things which deserve notice, and for which I can only urge the indisposition I have felt to weary you by too much of detail. One or two of these I will venture to notice, although

they would be likely to present themselves to your minds from what I have already said. One of these is the necessity of making yourselves familiar with the statutes of the State in which you propose to commence practice; not so much with a view of avoiding the necessity of recurring to the letter of these as questions may arise under them, as to fix it in your minds that, upon certain subjects, the rules of the common law have been changed or modified; so that when questions occur you may not be led into an error by adopting, without reserve, what you may find laid down in your text-books, or the reported cases which you may have read.

8. In the next place, I may have seemed to pass over too lightly the culture of general scholarship, without which there is danger of one's moral and intellectual powers and faculties becoming stunted in their growth and activity. But, if I have done so, it is because the time of a student is too much engrossed in the brief space allotted to his preparatory routine in other studies to admit of any systematic course of reading outside of the proper curriculum of those studies; and the time for indulging in works of taste and general culture can be safely postponed till the hours of involuntary leisure, which are apt to fall to the lot of most young men in their practice, shall furnish a more favorable opportunity.

9. This period of preparation I have assumed to be three years; not because I believe that any young man can in that time fit himself, with any consider-

able degree of completeness, for the multifarious demands which may be made upon him in his profession, but because the law, in several of the States, prescribes that as the requisite time ; and because, with so many who are entering the bar, they are hardly free to choose in the matter where their poverty, rather than their will, consents in sacrificing expediency to necessity. And then, again, it has been found experimentally that even with that brief preparation a lawyer, after a course of reasonable diligence in study, may do many things with sufficient accuracy and ability to make himself useful to others, while he may be earning something for himself. I have therefore measured in my own mind what would give full occupation to a student during the assumed period of three years, leaving, of course, much to be supplied in filling up what at best can only be an outline. I have not attempted to follow the example of many others, in laying down a course of reading, or the books to be read. It seemed to me that this had better be left to the student, under the advice of a competent teacher ; while I have reminded you only that there are some departments of the science of which you must know something, and with a good degree of accuracy. And to that end you must read with care and attention one or more works upon the principal subject embraced in each of these. And I might add that in many of the States, in order to gain admission to the bar, one must submit to an examination to test his general fitness to assume its duties. But what is more, he should bear in mind that after entering the pro-

fession he may be called upon to take part in the conduct of a case, upon his skill in the management of which he is to depend for the first impression he shall make of his talent and ability as a lawyer which may seriously affect his subsequent prospects ; and that he may be thus called on without having had any thing more than a brief opportunity to prepare himself for the encounter. And, finally, let him bear in mind that with all his diligence and success in preparation for admission to the bar, and however fortunate he may be at the start, he has but reached the point at which the real race of life is to begin ; and that its goal is to be won, if at all, among the competitors for the prize, by constant and unflinching effort alone. In this race, though it is over a course free to all, irrespective of birth or family, in which even poverty sets up no barrier, each man must rise, if at all, by the force of his own unaided muscle ; and every man may, by diligence and the grace of God, win for himself the respect which is due to high purpose and generous effort.

LECTURE IV.

PRACTICE.

1. Chances of Success. — 2. Classes of the Profession. — 3. Its Rewards, and how won. — 4. Social and Moral Duties of the Lawyer. — 5. Books to be read and studied. — 6. Study of Roman Law. — 7. Libraries. — 8. How to reach Public Sentiment. — 9. Necessary Specialties of Learning and Science.

1. I have spoken of the competitors which a lawyer, upon entering the profession, finds in his way. These are of two kinds, — such as are struggling to win the places it offers of power and influence; and such as are eager to gather up whatever there may be of profit or gain which it may promise to those who pursue it. Whether, therefore, a young man enters the bar to earn rank and position, or the means of a livelihood, he finds the places apparently all occupied; and the only chance left for him is by crowding others, or being starved in the unequal struggle. I say apparently, for this terror at an overstocked profession is by no means a new one. Tradition does not go back to the time when the same thing was not true. Even the good Mr. Lechford found the Colony of Massachusetts Bay too small a field for him, though the only lawyer in it; and he went back to find more room at the English bar. Nor have we any reason to suppose there will ever be less competition in the profession than there

now is, whether it be for its high or low places. It is due, therefore, to the young men who are honestly endeavoring to fit themselves to engage in the contest, when pointing out what should be the preparation to win in it, to say a few words upon what seems to stand so materially between them and success. Historically, the instances are rare where an earnest, right-minded young man, with fair natural abilities and a reasonable share of industry, has failed, in the end, to earn a livelihood in the profession; and with it the confidence and respect of his fellow-citizens. And while the ranks of pettifoggers and low tradesmen in the profession are frightfully crowded, that of able, competent, and devoted lawyers has never been overstocked. Such men are a necessity in every well-regulated State; nor will the world get in advance of the law, so as to render the profession useless in the machinery of society, until the millennium shall have done its work. And as for being crowded, it is quoted from Mr. Webster that "there is always room enough aloft." And it seems to me that very much is to depend, in every case, with which stratum of the social aggregation the young man proposes to content himself. If the lowest, he must expect to be crowded and jostled at every turn. If he go higher, he will find the space widening at every step as he advances; though as he looks, for the first time, upon the signs along the streets, and into the registers of counsellors and attorneys-at-law, which show an array as formidable as the muster-rolls of our army, it is not to be wondered at that his heart misgives him, and

that he asks himself where he is to get even a pittance with so many already living upon such a scanty fare. If the profession opened no other avenue to honorable places and employments than through the advocacy of causes in court, this inquiry would be indeed disheartening. Everybody must have remarked that comparatively few of those who do get a liberal income from their profession are actually engaged in the conduct of causes before courts or juries. And it is only when we reflect what a large proportion of the business of a community is done through the agency, or, what is the same, the attorneyship of others; and how much of this business requires just such learning, skill, and confidence as are found in a well-trained lawyer,—that we begin to perceive the extent of the field in which a capable and trustworthy lawyer may find honorable and remunerative employment. And although intellectual labor is never paid in proportion to mechanical skill and science, and the manager of a railroad receives often twice as much as is paid the Chief Justice of the United States, yet there are occasions constantly occurring where general knowledge, as well as specialty in science, is required; and which offer an honorable employment for the profession, for the reason, among other things, that one who has been properly trained to it acquires thereby a tact and readiness to fill almost any other place with ability and acceptance.

Out of all these it may not be in the power of a young man to choose that position or employment which may best strike his fancy, or gratify his pref-

erence ; but his course is a plain one, so far as he is concerned. Let him aim at some point in his profession which is worthy of any man's reasonable ambition, and, as often as opportunity offers, let him vindicate his claim to the confidence and respect of others by doing the best he can. Some young men despise "the day of small things," and wait for some occasion suited to the powers which they are conscious of possessing. But such occasions do not always come ; and as *opportunity* is what, after all, makes a man's success, a young man loses nothing, if he do not suffer his aims and purposes to be degraded, in availing himself of whatever chance offers to exhibit such powers as the occasion calls for. The most important, and, I may add, in most cases the most difficult, thing in its bearing upon the future of a lawyer's life is the start which he gets in his profession. For that, he is often dependent upon circumstances beyond his control. But when he has had a fair chance to show what he can do, it is, as a general thing, his own fault if he fails of ultimate success. Let the public see that he can do, and is ready and willing to do, and that, if he is employed, he will give to his work earnestness, diligence, and fidelity ; and success in one effort opens the door to others, till his reputation is established, and his own personal conduct and character create that confidence between him and his clients which, with his learning and tact, are the working capital of a lawyer. No man, it is true, can always predicate success of any course of life ; but let a young man begin as I have endeavored to indicate,

and let him persevere, not doubting the relation there is between cause and effect, and he may have the same assurance of reaching the goal he aims at, as the strong man who has been properly trained has when he starts upon the race which he is about to run. Let him, so far as he can, select that department of business which is best suited to his taste and capacity; but let him bring to whatever he undertakes the offerings of a free will and a devoted spirit, and he may soon discover if the law has for him a career, and from that point go on till he makes sure of the rewards it holds out to merit and desert.

But before entering more into detail upon the proper practice of the law, to which the student is admitted on his joining the bar, I wish again to remind you that every word I have said of the importance of systematic study to a student applies with still stronger force to the case of the young lawyer. With the student, it is but laying the foundation of a structure for the plan and outline of which he is more or less dependent upon the wisdom and judgment of others. But with the lawyer, he has to be his own architect and builder, in rearing what it is to be his life work to finish and adorn. And while in what I have been saying I have had no purpose to dogmatize in what concerns others, I have endeavored to draw hints from the experience of those who have filled these seats before you, and who have illustrated in their success what earnest and diligent young men may always hope to achieve when they devote themselves to the work in the

manner which the attainment of eminence in any calling or profession demands. In confirmation of some of these, let me quote the advice of Mr. Choate to one of his own students, — to give six hours a day to the law: four of these to reading, and two to thought and reflection.¹ And I cite this for another purpose, to urge upon you the cultivation of a habit of ruminating what you read, of recalling it and revolving it in your minds, till you are sure you comprehend its meaning, and understand its use and application. Such a habit is easily acquired, till you lose the consciousness of effort in the pleasure and satisfaction that it gives. Frequent and constant reading, without this habit, soon generates a torpor or dyspepsia, such as the body acquires from forcing more food into the stomach, even though rich and racy, than it is able thoroughly to digest. Many a would-be student and scholar has in this way turned out at last a learned dunce. Learning and diligence, let me add, can never make up or supply the want of good common sense; and of the two the lawyer can least afford to sacrifice the latter.

Without dwelling upon the real or assumed ordeal through which the student is presumed to pass in order to his admission to the bar, or that sense of new responsibilities which it can hardly fail to impress, I will venture to hope, — when you have taken that step, and the thought comes back upon you that you are hereafter to depend upon your selves, — you will be ready to receive with indulgence, if not with favor, suggestions, however homely or

¹ 1 Cooley's Black, xxxi.

commonplace, which have been borrowed from the experience of others, and which may bear upon what you will have a right to expect in your own case.

2. But before I venture to speak of what a lawyer owes to himself and the public, in doing justice to each, I would apprise you of some of the different classes into which the profession is divided, that you may understand to which of these my remarks are intended to apply.

The term *lawyer* is, by courtesy and general use, very broad; embracing all who for any cause or by whatever means have been admitted by the courts to engage in the practice of the law for pay, often irrespective of learning, ability, or honorable dealing. But nothing can be more distinct than the classes into which these are divided, while to some of these the remarks I propose to make have no reference or bearing. Thus there are sharp and skilful practitioners, who understand the tricks and quibbles of the profession, and know how to apply them with great effect in getting money, and have no higher ambition than to turn their cunning to account in this way. This class embraces that body known as Old-Bailey practitioners, of whom there are a few in almost every considerable bar. Then there is a class who make the bar a stepping-stone to office, and use it as an instrument in the poor trade of politics. Another and often amiable but unfortunate class, with fair talents, perhaps cultivated tastes and right intentions, have rich fathers or bachelor uncles on whom they are willing to depend, and had

rather wait for dead men's shoes than put forth an effort to earn their own. I copy upon this point an extract from an address, before the law school of Washington, to the graduating class of that institution by a distinguished orator of the West: "If you are poor, as I hope you are, for I regard that as an almost indispensable condition of your success." "Not to be hard upon the rich, I ought to say that a man with more money than can easily be invested in books *may* become a lawyer. A rich man may possibly enter into the kingdom of heaven,—so a rich man may possibly become a good lawyer; but I always pity him when I think how fearfully the chances are against him."¹ For the classes of which I have been speaking, I have not a word to say. They would not heed, if they understood, what is meant by the generous culture, the sound learning, and the persistent labor which lie at the foundation of a true lawyer's success.

3. The only class I can hope to reach are those who know how to measure the rewards which the profession holds out to such as are willing to earn them by talent, industry, and devotion to duty. And although neither ease nor sudden wealth are among the promises it offers, it guarantees an honorable livelihood, and an assurance of what is better than wealth,—the respect which men instinctively pay to high purpose and earnest effort. Nor is that all. If his aim is the possession of power, he can in no way exert a control and influence over his fellow-

¹ 4 West. Jurist, 320.

men more worthy of a noble ambition than that by which he wields the passions and sways the judgments of others by the force of trained and disciplined thoughts. In the belief that rewards like these have more to attract your ambition than the dazzling prizes of wealth and splendid estates, I shall venture to ask you to stop with me a moment, and look calmly and considerately at the obstacles which will lie in your way, that you may be prepared to meet and surmount them. You are to remember, as I have already said, that you are thus taking a new start in the race that lies before you, and have reached a higher plane. You are putting on the *toga virilis*, and taking to yourselves the duties and responsibilities of being your own masters. You may not cease to be students, but you are to be your own teachers. Your education is not completed: its field is only enlarged. You have not got through hard work; but, instead of it, you need stronger muscles and a more resolute will than ever to grapple with its hundred new forms. The world, in the mean time, is growing more exacting in its demands; and things that were winked at as follies and indiscretions of youth, on one side of the line, become the grave faults of manhood when done upon the other. In the charity of the world, students have their peccadilloes, as children have the measles or whooping-cough, because they are an incident of that period of life; and every one expects they will recover, and be none the worse for them. But when that stage in life has been passed, the same world grows censorious and impatient to see a youth's cap of folly

upon the head of one who has entered upon man's estate.

4. Do not suppose that I am saying this to read you a lecture on moral duties beyond their connection with your personal and professional success. But to that extent I know not why I may not speak of morals as I would of physical or intellectual culture, as an element of power and progress at the bar. And there is another thing of which you ought to be reminded ; that when you have come to the bar, and have begun to act for yourselves, you will have less time and opportunity to watch your own habits, and to guard against outside influences which tend to divide one's attention, and weaken his resolutions. A young man experiences this in various ways in his solicitude to obtain business by mixing and associating with others, and conforming to the habits and modes of life and fashion of friends and companions. To guard against these tendencies requires an observance of the same rules in a lawyer as in a student. System is every thing ; and in pursuing it, if he will observe a course of duty and discipline till it becomes a habit, it ceases to be an irksome effort, and grows to be as natural as if originally prompted by instinct. In such a case, he has to make and execute his own law ; but, in so doing, if he is wise, he will gather hints from the experience of others, and borrow wisdom from even their follies and mistakes.

It has often been assumed as a condition of true eloquence that the orator should be a good man ; and

while I would not use the term in a canting or offensive sense, it is equally true of a successful lawyer. There is no profession or calling wherein success depends more directly and immediately upon a reputation for honesty and fidelity than that of a lawyer. Nor can one sufficiently admire the consistency of a gentleman who left the profession on the score of conscientious scruples, to become a broker in Wall Street! The confidence which the public have in a lawyer's honesty, as well as capacity, is the capital on which he trades, and without which he would starve in the midst of plenty. Nor can he wisely or safely disregard even what some might call the prejudices of his fellow-citizens, if they take the form of sentiment and conviction; and, regarded from no higher point of view than self-interest, a young lawyer makes a serious, if not a fatal mistake, who slights or disregards the laws and usages of Christian communities, whether he ascribes them to human or divine authority. Where so many regard the Bible as a divine revelation, it is worse than folly for one who has any desire to share the respect of others for his prudence or sense of propriety, to indulge in sneering criticisms upon its authenticity, or the truths it reveals. And I hesitate not in going further, to say that if he wishes to cultivate a familiarity with the best and most effective form of the English language, or to store his mind with the most sublime conceptions and noble thoughts, such as have never been surpassed for grandeur, beauty, or magnificence, he should make the Bible a study for the models and examples of which it is full. Nor can he study any

book which will so well teach him as this how to sway the judgments and control the wills of other men, by the insight it gives into the laws of human nature and the motives of the human heart. And as for the law itself, in no other book can he find so many of the elements of what he brings daily into play in the business by which he earns his livelihood. Another thing to be regarded in this connection is the frequent and regular periods of rest which are inculcated in the book to which I have just referred. I do not believe that a lawyer can work, with the life and vigor which justice to himself demands, more than six out of seven days, for any considerable length of time, without endangering if not actually impairing his capacity to work. There are sad spectacles, in every business around us, of fine intellects paralyzed or prostrated by over-taxation of the brain, enough to warn a young man as to the manner in which he should treat that delicate and sensitive organ. The bow kept always bent at last loses its power of tension; and the mind, like the body, by a continuous strain, exhausts the quick and vital energy which vigorous health gives to the system. Such being the law under which we are created, it is worse than folly to disregard it. The young man must have his hours of sleep and his hours of relaxation; or he will pay for cheating himself of these by the forced rest from labor which nature will impose upon him when he can least afford it. Whatever, therefore, may be the speculative notions of a lawyer as to the higher obligation to observe the Christian sabbath, there is enough in the need of such

a relaxation from his labors, and a decent respect to the opinions of others, to suggest the wisdom of substituting something else than law as a mental occupation for at least one day in the week.

And while I am upon the subject of the importance of establishing and maintaining good habits as an element of a lawyer's success, I wish to refer to one topic in respect to which I have little fear of being misapprehended; although you may, at first, suspect me of going outside of the proper sphere of a lecturer upon law. Every man is aware that there is in the constitution of our natures a nervous energy which is sometimes called *reserved power*, which men possess unconsciously to themselves, and is only called out on sudden and extraordinary emergencies. Feeble and delicate women have, at times, performed feats of strength which under ordinary circumstances would have been as impossible as to move a mountain,—snatching a sick husband or child from threatening danger from flood or fire, and carrying him to a place of safety. Nor is it limited to physical power alone. It is seen in the exhibition of mental efforts in the suddenness and accuracy with which judgments are formed, that, under ordinary circumstances, would require time and reflection, and the slow processes of remembering, comparing, and reasoning, in order to reach a conclusion under which one would be willing to act. Such is often the case with a commander in a sharply contested battle, where the changing phases of the action leave no time for forming a judgment, and the fate of the day may depend upon the instantaneous

resolve which dictates the movement of the troops engaged. And the greater or less facility and coolness with which this is done often marks the difference between the man of genius and the man of rule and precedent. We call such men inspired, when under such an excitement they rise to the measure of a great occasion. But no man can have such a strain upon body or mind for any long period of time. The body faints in the effort, or the mind ceases to obey the will. Nor are these analogies lost upon the lawyer. I hardly need remind you how severe at times is the demand which is made upon his best and highest powers in the conduct of a case in court. It becomes an intellectual battle, in which the fortune of the day is constantly changing, as new facts are developed, and new elements of complicity disclose themselves. And not unfrequently the counsel upon the one side or the other finds himself driven from the ground on which he had, as he supposed, securely entrenched himself, and forced to take up a new position in the very midst of the conflict. And though it may seem extravagant to associate what is ordinarily accompanied with so little of eclat with what strikes the common mind with surprise as an extraordinary power and prowess in a warrior, it needs no argument to show that to carry through a conflict where two able and skilful advocates are engaged in the trial of a contested issue demands a presence of mind, a power of combination, and a quickness of reasoning and reaching conclusions, which may, and does at times, tax the strongest intellect to its utmost. A man must, moreover, feel

a consciousness that he can, whenever an emergency arises, bring out and call this power into exercise, in order to have that confidence in himself that shall put him at ease in conducting such a trial. And the want of it must account for so many well-read and well-trained lawyers shrinking from engaging in the trials of causes in court. Nor do I know, in any of the common affairs of life, any business or profession which calls so often for an exercise of so much of a man's reserved power as that of the law. In that, the lawyer has his own reputation in charge as well as the cause of his client, and success or failure often assumes an interest and importance hardly second to the instinct of life itself. And to be obliged to decide, upon the moment, upon a measure on which the fate of his case may depend, calls for something far beyond the every-day powers and faculties of even a well-balanced mind.

Now no man has a jot more of this reserved power than he may need for use, nor can he afford to squander or waste it for ignoble purposes. And if he will tax and stimulate his brain till his nervous system is unduly excited and his nervous energy exhausted, no matter how, he is spending a power which he ought to keep in reserve, and weakening and wasting it, every time that this brain-stimulus is forced and overwrought. Many an orator who has won a fame by the brilliancy of his thoughts and periods, for which he was indebted to an artificial inspiration, has lived to show faint and feeble flashes like those that are seen of a summer's evening coming up from behind the western horizon, after

the force and real play of the lightning has been exhausted. And history has told us of more than one general who has lost a well-planned battle, by failing to call up, when he most needed it, that subtle power which earned him an early fame before it had been weakened or wasted by unwise indulgence. And while I disclaim the mission of a lecturer upon temperance, I may not forbear reminding every lawyer that he cannot afford to trifle with these mysterious energies of nature, which he will need in all their vigor, if he ever expects to master questions that may call for the best and most disciplined powers, or to wield that sway over the judgments and opinions of courts and juries which it is the business and ought to be the highest ambition of every generous and right-minded lawyer to command.

Of the habit of implicitly observing truth, or of the poor wit which is so cheaply expended upon the profession in its relation to a vice so mean as the opposite of this, I do not wish to offer a word. With even a doubtful reputation in this respect, no man can hold up his head before his associates of the bar; and as an evidence of my own conviction of what ought to and does belong to the profession in its normal state, I need only add that in thirty years' experience at the bar, in a somewhat extensive practice, I never asked nor gave a written promise in a professional dealing or transaction with a brother lawyer, nor do I now recollect the breach of an oral one.

One reason why I have thus early introduced this subject of moral duties is, in the first place, the

intrinsic importance of it; and in the next, the ease with which the practice of these duties may become a habit of life, if adopted by a lawyer at the start. And I might dwell with the same propriety upon the necessity of cultivating good physical habits,— such as the regularity of the hours of sleep and study, of the times of work and relaxation, of joining in the amenities and amusements of general society; or, what generally comes along in due time in the course of human experience, the cares and responsibilities, the goadings and encouragements to exertion, of a family. But as every man early discovers the necessity of being his own doctor, and soon learns to take counsel from the circumstances in which he finds himself placed, I shall pass at once from this subject to what are more specially and peculiarly professional duties and responsibilities.

5. As, in the view I have thus far taken, we have assumed that a young man, upon entering the bar, has much to learn without as well as within the proper scope of his profession, one of the earliest inquiries is, How is he to gain this requisite knowledge?— if by reading, what shall be the books, and in what manner is he to read them? In the first place, he can no longer content himself with a general notion of the subjects which he is studying: he must now understand them thoroughly and accurately, as well as the bearing of one upon another; so as to be ready to apply his learning whenever an exigency may arise. For this he must read elementary treatises, and supplement these by reported

cases. This will, moreover, call for a careful analysis of the facts of each case, the arguments made use of by counsel, and the opinions of judges showing the grounds upon which they rest their decisions. And in so doing he not only gains a store of principles that he may apply to new questions, but he has been training and disciplining himself to the same processes by which, in the decided cases, the counsel and court made up and established the opinions therein maintained.

But it would be, indeed, a fearful undertaking to study the cases which have been reported, even in our own country. The years of Methuselah would be too short for it. The only way in which they can be profitably studied is in classes ; and, in the next place, the leading and more important ones only in a class. An exception to this are the volumes of the reported cases of the State in which one is to practise his profession, since it is in these alone that he gets at the history and traditions of the law of his own State, its changes, and the reasons upon which it rests. And the very effort of hunting among the rubbish of the past enables one to understand and appreciate what is valuable and worth preserving. I might illustrate these remarks by referring to various reported cases in New York upon the subject of charitable uses, if, indeed, the law is settled there at last.

One mode of studying law which commends itself to a young lawyer's attention is by taking it up in connection with some subject upon which he has been consulted, and has occasion to make up and

express an opinion, in the course of his practice. No matter how unimportant may be the particular point of inquiry, it will serve as a principle of *mne-
monics*, by which he associates and recalls whatever he reads that bears upon this subject. The importance of the subject does not, in this point of view, depend at all upon the amount involved in it. Suppose the question be whether an article has been actually sold and purchased. This might involve the inquiry into what constitutes a contract of sale, what formalities it requires for its consummation, how far it is affected by the Statute of Frauds, vendor's lien or right of stoppage *in transitu*, and the like? Nor would it matter, in settling these, whether the article was of the value of ten pounds or ten times that amount.

Let him, then, if a question of this kind calls for his opinion, carry his inquiry into these collateral matters; and when any other related subject comes up anew in a different form, he will be at once at home upon it: and in that way he may make himself familiar with one subject after another, so as soon to be ready for an answer to many of the questions which ordinarily arise in one's practice, before they present themselves for solution. It not only greatly facilitates his labor, but creates in the minds of others an impression of ready learning, which helps a young man in establishing what he most needs at starting, — a reputation for quickness and accuracy. This habit of reading in reference to particular subjects may often lead to a greater familiarity with some departments of the law than

others, which may not at times be to be regretted; especially in the larger cities, where business tends to divide itself into something like specialties, one man becoming an expert conveyancer, another an adept in mercantile law, and another a master of equity. This may result from a preference on the part of the lawyer himself; but it may also arise from accidental causes, such as I have indicated.

Still it is not wise nor advisable for a young man to confine his reading to any particular class of subjects. Law is too nearly related in all its parts for one who is to live by it to throw away the benefits he may gain by studying it in any of its forms. Let him go on, step by step, and as occasion shall offer, and master every subject within his power, even if it is not to be immediately applied. If it do no more, it helps to liberalize his views, and to impress more sensibly upon him the wonderful harmony which prevails throughout the science of jurisprudence, and to show its workings in binding society together, and regulating the multiform interests and relations of which it is composed.

6. And let me here add a single word upon the study of the Roman or civil law. The notion that once prevailed that there was a repugnance between the common and the civil law has been greatly modified, if not removed, as the subject has come to be better understood. It has been found that the common law owes many of its most important principles, which affect trade and commerce, to the civil law and the systems of the Continent; and that it

has borrowed many, if not the most, of its doctrines upon trusts, bailments, and the law of testaments and administration, from the same sources. The same may be said of the law of easements and servitudes; and the common law is constantly drawing from the exhaustless fountain of the civil law in building up and illustrating itself as an ever-growing and expanding system. The world is still witnessing the truth of the language of Chancellor D'Aguesseau, as quoted by Mr. Legare upon the origin, history, and influence of Roman legislation: "As if the mighty destinies of Rome were not yet fulfilled, she reigns throughout the whole earth by her reason, after having ceased to reign by her authority." — "They (the Roman lawyers) are the surest interpreters even of our laws; they lend, so to express it, their wisdom to our usages, their reason to our customs; and, by the principles which they furnish us, they serve us as a guide when we walk in ways which were unknown to them."¹

A recent work of Professor Güterbock, translated by Mr. Brenton Coxe, gives us a pretty accurate idea of the extent to which Bracton borrowed from the civil law the materials of his famous treatise, "*De Legibus*," &c. And he has been called the father of the English law. In this connection I would name a modern work on ancient law by Mr. Mayne, which I cannot commend too highly to any one who wishes to study the elements of law in its broadest and most liberal sense. He deals with the civil law as he does with other systems, in illustrating and

¹ 5 N. Y. Rev. 17.

bringing out the principles of municipal law ; and his is an admirable representative of a class of books which have been laid before the profession of late, tending to throw light upon the modern in its connection with the ancient law, among which I may perhaps mention, without attempting to draw comparisons, a work of Lord Mackenzie, — “ *Studies in Roman Law.*”¹ Such works as these would prepare one, if his taste and leisure permitted, to take up the subjects of the civil law which relate more immediately to the jurisprudence of our own country.

7. What I have said, and propose yet to say, on the subject of books, implies the necessity of having access to a library. Every lawyer must have some books as the tools of his trade. Even in his poverty he cannot dispense with the statutes and reports of his own State, a book of forms, and some of the more practical treatises. In adding to these, each one must be his own judge in selecting what he most needs, and is best able to purchase. Nor is there any danger that a lawyer will not do this, if he has any of the spirit of which lawyers are made ; for next to that for his home, his wife, and his children, his love for his books is his strongest passion. They are his companions day and night, and they seem to look down kindly upon him whenever he comes into his office. And he finds it easier to read and understand one of his own than an unfamiliar volume.

In the address before quoted the author tells the

¹ Second edition, 1865.

young men who are entering the profession : “Having fixed on the town, select an office and *furnish* it comfortably with the first money you can *earn*. But, first of all, immediately store it with all the books you can *borrow* the money to buy.”

From such sources as may be accessible you not only should supply yourselves with such reading as I have indicated, but with books of history, especially such as illustrate the rise and changes in the science of jurisprudence. No lawyer can pretend to a liberal education in his profession who is ignorant of the history of constitutional and international law. For those of England he would find the works of Hallam and May in every good library ; and Kent and Wheaton would serve for our own country, until he can take up the subjects upon broader grounds. No one could think of leading and influencing the opinions of others upon these subjects, without having a pretty thorough knowledge of the best works which treat of them.

8. And this leads me to indulge in a remark, the truth of which presents itself at almost every stage of our inquiry ; that, with all the power of public opinion every well-trained and educated lawyer has an important share in giving it its impulse and direction. Whatever goes to make up the force of public sentiment in a community like ours would be found, if traced to its source, to come from a very few individuals ; and those the thinking and reflecting men who have become fitted, by training and habits of thought, to guide the opinions of

others. Nor is there any thing remarkable in this, when we remember that in the case of the masses so little time can be snatched from the absorbing cares of a busy life, in which to investigate and settle the matters that lie outside of their business and observation. They are content, therefore, to take many of their opinions at second hand, and to follow, unconsciously, the lead of others for the convictions they cherish as the instincts of right and duty. This runs into every thing that enters into popular belief, or goes to shape and direct the popular will. In this way parties in politics are led and managed, theories in political economy are propagated, and doctrines in finance get their hold upon the public mind. If, then, a man is so situated as to feel that he is exercising an influence over the public mind by his example or opinions, he can hardly fail to be impressed with the importance of acting and judging wisely and upon well-founded principles.

Few men in our country are more favorably situated to exert such an influence than a lawyer in general practice. It is a part of his profession to form and maintain judgments and opinions for the guidance of others; and, at the same time, it is the habit of others to accept these as a rule of conduct and action, without criticism or question. Nor do they always discriminate between professional and other opinions in the degree of respect that is due to each; so that a lawyer often unconsciously becomes a kind of oracle to the circle of his clients and associates; and, taken collectively, a Bar thus exerts a moral power in a community which

reaches further than can easily be measured, and further than the individual himself is aware. To meet the responsibility which is thus implied, demands, on the part of every lawyer, a preparation of a broad and varied character, by general reading and keeping up with the progress of discovery in science, and the advance of philosophic thought. This is aside from the range of technical and specific knowledge which is more immediately connected with the business of his profession.

9. In the conduct of that, he is often called upon to learn something of subjects which are wholly unrelated to one another, and have sometimes to be studied for a single occasion. This is often true in the preparation and management of a particular case, where, for the purpose of presenting to the court or jury the grounds of his action or defence, and of being able to examine and cross-examine the witnesses that may be called in the trial of it, it becomes necessary to illustrate and explain to them the laws of science, the terms and habits of trade, and the processes of manufacture which may be wholly unfamiliar to them. I have known instances in a country court where the same counsel, at a single term, has had to try a matter of mal-practice against a physician, a question whether a horse that had been warranted sound had some one or more of the thousand diseases which the flesh of such animals is heir to, and one of injury to a cotton mill, involving the laws of hydraulics, the capacity of water-wheels, and the general science of

mechanical powers ; and to conduct these with reasonable skill and ability required a very considerable amount of accurate learning in anatomy, materia medica, pathology, and natural philosophy, — all of which, one would, at first thought, have been inclined to suppose, were wholly unrelated to the science of law.

I have not touched upon this subject with any view of indicating a course of reading which the new beginner should adopt, outside of his proper professional studies, but to remind him that he can scarcely read any thing which he may not, at some time, have occasion to turn to account; and to remind him, moreover, that self-respect demands of him that, in expressing thoughts and opinions which are to influence others, he should be cautious that they are sound, as well as manly and discreet. Nor would I limit these remarks to any stage of a lawyer's experience, although I am speaking to you now as young men, just entering upon your professional

LECTURE V.

PRACTICE. — *Continued.*

1. If Success is slow, no Cause of Discouragement. — 2. Self-reliance essential. — 3. Selecting one's Business. — 4. Acting for Bad Men and in Doubtful Causes. — 5. Promptness and Punctuality. — 6. Consultations and Giving Advice. — 7. Duty towards the Jury. — 8. Practice in City or Country. — 9. Partnership in Business. — 10. Conveyancing. — 11. Unprofessional Opinions. — 12. Professional Advice and Opinions. — 13. Defending Criminals.

1. There are other hints that are proper to be addressed to one beginning practice, which might be readily drawn from the experience of his older brethren. And perhaps the first of these should be that he be not discouraged or disheartened at any apparent want of early success, nor suffer himself to be made unhappy or discontented with the profession he has chosen, by imagining he could have done better if he had selected some other business or avocation.

This habit of self-torture, by comparing his condition with that of somebody else to his own disadvantage, is all but fatal to one's success, and wholly so to his happiness. It is sure to engender self-distrust, which paralyzes what powers he has, and an unsteadiness of purpose that is incompatible with persevering effort. This chasing after a chance to better one's condition only serves to keep him on

the run during his whole life. He never feels the independence of being settled. "Unstable as water, thou shalt not excel" is as true to-day as when it was uttered by Jacob of old. And unless the study and practice of the law are positively distasteful and repugnant to his feelings, he had better hold on upon the profession he has chosen, in the confidence that what is at first indifferent to him will, by familiarity, become in the end a pleasant and agreeable pursuit. And if it be an ordeal to him to pass through this process of legal acclimation, he will have this to encourage him, — that he would be long in finding a calling which had been as signally illustrated by honored and distinguished names, all of whom had gone through the same processes as he is submitting to, to win the rewards it holds out to diligence and good conduct.

2. In the next place, let a young man understand that he is to depend upon himself for his ultimate success. The patronage of friends, and the favor of men of wealth and influence, are very well in their place, provided one does not depend upon them. But so surely as he does, and neglects to qualify himself to go on without them, he will fail. He finds that even one of these so-called patrons, if he has a cause in court to manage, will employ the man who he thinks will conduct it best, instead of intrusting it to a family pet, or selecting one to do his business who happens to be a pleasant guest at his table. Men choose their law-

yers for their skill and fidelity, and not because they vote the same ticket or belong to the same church.

A new beginner may be reminded, also, that it is not always wise to be over fastidious in the matter of his clients or their cases. The limitation I should make to this would be, that he is not called upon to aid in doing a dishonest or dishonorable act. On the other hand, he should never despise a day of small things. What he needs to start with, next to capacity to do business, is *opportunity* to do it. And as he cannot always choose when and what that shall be, if a matter of great moment do not offer, let him cheerfully take up with such as does, and do the best to turn it to the desired account. One may often show so much tact and skill in the management of a case involving ten dollars, for a poor man, that a richer one would be satisfied to intrust him with one of ten times that amount. The great secret of success is to do every thing he undertakes in the best manner he can, and to neglect nothing which requires his attention, whether the matter be great or small, for a rich man or a poor one. By such a course he may hope to be able, in time, to choose the business he prefers, and can afford to pass over questionable clients to the next beginner, who may wish to avail himself of a similar course of patronage.

3. But let him, by no means, become wedded *by choice* to an inferior class of clients or business. It may be easier and more exciting to defend a crim-

inal in court than to examine and unravel a complicated title to land, or defend a suit upon a policy of insurance, or carry on one for goods lost by a carrier ; but the effect upon the counsel himself, of one kind of practice or the other, reaches further than the present moment. There is danger of its leading to bad habits and bad associations, and of blunting the sensibility which is at first shocked by coarseness or vulgarity. And while it may be at times not only proper, but a duty, to engage in criminal matters, it is not to be denied that not a few who are accustomed to such business do get an Old-Bailey odor upon their garments which shows itself wherever they go.

4. I would not, however, be misunderstood upon this subject of defending persons charged with crimes. There is a great deal of cant and *twaddle* in the community about lawyers lending themselves to shield the guilty and defeat justice ; as if the cause of justice was not strengthened, and the confidence in its administration confirmed in the public mind, by its being known that no man can be convicted except upon a fair trial, even though, now and then, a guilty man escapes.

I heard an over-zealous advocate of temperance berate a lawyer, in a public address, for aiding a man to escape punishment upon a charge of having sold a pint of spirituous liquor ; when all that he had done for his client was to point out to the court a fatal defect in the complaint against him, upon which the judge directed the defendant to be discharged.

It did but show the thoughtlessness, to use no harsher term, of those who would ride over the forms of law to reach the unfortunate victim of popular suspicion, while they forget in such cases they are as often striking a blow at the innocent as the guilty. Who could feel safe a moment if his life, property, and reputation hung upon no stronger tenure than the favor or prejudice of a fickle multitude, and no lawyer could be found bold enough to advocate his cause because he was afraid of a popular clamor? Had John Adams, Josiah Quincy, Jr., and Sampson Salter Blowers quailed before the cry for vengeance which went up from an infuriated populace against the British soldiers who shot down Crispus Attucks in the streets of Boston, in 1770, and justice had taken its clew from what the people demanded, independent of the forms of law, Massachusetts would have lost one of the noblest moral triumphs in all her illustrious history,—the acquittal of these men by an independent jury through the bold and manly defence of faithful and able counsel.

But the question does not expend itself upon individual instances of courage, or the conviction or escape of this man or that charged with crimes. It lies deeper, and goes down to the foundation and constitution of civil government itself. One of the purposes of government is to create a feeling of security on the part of the citizens that the humblest of them is protected by wise laws, wisely and impartially administered. Nor can a people be accounted free who do not feel that life, and property too, are safe before the tribunals which are to pass

upon the questions on which these depend. Next to the certainty of having justice done is the assurance of its being fairly done ; and that the law can and will apply tests, as nearly infallible as may be, to discriminate between the guilty and the innocent, between what is right and what is wrong. It is here we have to meet the question with which we started, with no sickly sentimentalism about the guilty "going unwhipped of justice." The truth is, the public need, and they must have, a class of able, trained, and disciplined men, set apart as ministers of the law, whose services all may command ; who can and will stand by any one against whom society is aiming a blow, so far as to see that he is fairly dealt by, and that justice between him and the public is meted out with an even hand.

But while I am insisting that it is not only the right, but the duty, of a lawyer to act as the advocate of any man who is charged with a crime, if his services are sought or desired, I claim for him no indulgence in the way of trick, falsehood, or misrepresentation. He has no more right to use these in defending another than he has in getting his neighbor's money, or cheating by false pretences. But such means as the law has furnished him, and made it lawful for him to use, he would be derelict in duty if he failed to apply, no matter what his suspicions may be. If a guilty man thereby escapes, honest men would feel safer in the assurance they would thus gain, that whatever the law is it is no respecter of persons, and that no man is beyond the pale of its protection, than they would to see a

wretch sent to prison because no one could be found to plead his cause.

I come back, then, to the inquiry with which we began, by saying, so long as you keep within the limits of fair and honorable dealing, you need have no misgiving in lending your aid to any one accused of crime, or in giving him the best of your power and skill. Nor is there any danger that the State, which commands the best talent in the market, will not be equally careful in seeing that the public good does not suffer from any superior skill of yours.

But this, let me remind you most emphatically, does not reach nor cover the ground that has so long been a debatable one,—how far a lawyer may go in engaging in or carrying on suits between parties where he has cause to suspect or believe that the claim for which he is to contend is groundless or unjust. That there is a wrong side in every case which is tried is an obvious proposition; and few, I suppose, would be ready to affirm that the advocate of that side must therefore himself be wrong. Such a proposition would be absurd, when it is remembered how difficult it is, at times, for even the court itself, after all the facts in the case have been disclosed, to determine which party is in the right. Everybody who knows any thing of legal controversies must have seen that there is a wide margin between the line of what is clearly right and what is clearly wrong.

This is the debatable ground, so far as lawyers are concerned, in respect to which much ingenious casuistry has been employed,—how far a lawyer is

obnoxious to censure for engaging in a case of doubtful and uncertain right, and to what extent he may avail himself of the forms and technical rules of law to maintain or enforce the claims of his client. This is clear, that in the imperfect state of human society its laws must be more or less arbitrary and artificial, and sometimes must work injustice to individuals. A regard for the general peace and quiet of a community requires that there should be some limit beyond which a man shall not be liable to be sued by his neighbor for any real or pretended claim he may have against him; and every State has, accordingly, what is called a Statute of Limitations. And yet if A., who has a debt due him from B., forbears to press payment until after six years, and B. takes advantage of this indulgence to cheat A. out of the money he owes him, he is set down as little better than a knave. Suppose now B. calls upon his attorney to plead the statute of limitations to A.'s suit, is the attorney bound, nay, more, has he a right, to interpose his ideas of personal duty and responsibility between B. and the law, because he proposes to make an improper use of it? The same may be said of the defence of infancy, statute of frauds, discharge in insolvency, and the like. Nor do I see any difference in respect to any defence which the law has seen fit to put into a party's hands. And it is equally difficult to see how, in such a case, the attorney has any discretion in the matter, or can be held amenable for the use that is made of it. This excludes the idea of any thing false or fraudulent in the mode of presenting

the client's cause, — such as the use of false papers, false or manufactured testimony, tampering with court or jurors, — and assumes that whatever is done is done fairly and without subterfuge. And, though volumes have been written upon the moral rights and duties of legal advocacy, the whole matter seems to lie within a narrow compass. No case can be fully understood until both sides have been heard. The law points out the mode in which this may be done; and if a lawyer is applied to, to undertake a suit which he does not know to be wrong, and he sees fit to engage in it, he has no right to withhold from his client any of the rights, privileges, or immunities which the law has provided for him. Nor is he called upon to act the part of the judge beforehand, and settle points of doubtful propriety, beyond the rules which the law itself has prescribed. All he has to do is to use fairly and honorably such means as the law puts into his hands in establishing and sustaining the claims of his client. Nor would the nicest casuist, upon a moment's reflection, be content to rest the question of a lawyer's duty to his client upon the good or bad reputation of that client, unless he is willing to substitute, for the protection which the law now throws around the person and property of the good and bad man alike, the test of good or bad reputation in a neighborhood where it rises or falls as the tide of favor sets in one direction or another. The proper function of courts and lawyers is to make all ranks, classes, and conditions in society feel assured that they live under a government of law.

5. When we come to the proper details of a lawyer's practice in his profession, I shall not undertake to classify its duties, as is practically done in some of our larger cities. In the general experience of the country, the practising lawyer has to be ready to turn his hand to almost every part of professional work, from drawing a justice writ or a quitclaim deed to conducting the largest causes before juries, or arguing questions of law before the highest courts in the State. But there are certain suggestions that apply to every kind of business, which the young man may do well to bear in mind. And in the first place is the importance of promptness and punctuality in doing whatever he has to do. This may be urged upon more grounds than one: in the first place, for the ease and pleasure of the thing. The man who does up his work promptly always has time and leisure to do something more, if an emergency calls for the effort; whereas he who puts off, as many do, every thing to the last, is always crowded and hurried, and feels oppressed by the very weight of what he has thus suffered to accumulate upon his hands, till the struggle he makes to rid himself of his burden grows irksome and unpleasant. The easiest time to do a piece of professional work is when it first offers, while there is some novelty about it, and before it gets to stand in the way of something else, as it is sure to do if not done up in proper season. If a man will never put off till to-morrow what he can do to-day, he enters upon to-morrow's work, when it comes, with a fresher spirit and a lighter step. The habit becomes more

valuable as his years go on, and his cares and avocations multiply in after life. Passing over the inconvenience of a habit of procrastination or want of punctuality to the individual himself, its effect upon others is often to be deprecated. Many a man in that way robs another of his time, worth more to him than money, without a scruple, who would shrink from taking a sixpence which did not belong to him ; and thus works a positive wrong and injustice. But the habit more often reacts upon the lawyer himself, if he is the one who indulges in it. To one who is engaged in a lawsuit it becomes an engrossing matter ; and he expects his counsel to partake of this interest. Nor does it depend upon the amount in controversy. The main object with litigant parties, in a large proportion of cases, is to win, and thus show their adversaries to be in the wrong. They expect, therefore, the sympathy, as well as the skill and ability, of the advocate they employ. And if they detect a want of either of these in the manner in which he attends to their cases, they feel injured, and grow distrustful of him ; and if a cause in the end is lost, the blame falls upon the hapless lawyer, who may, in fact, have spent sleepless nights in trying to do his duty to it. Whereas, if, when they wish to consult him upon a case, they find him in his place of business, ready to listen to what they have to say, and prompt and ready to act or give direction, they go away with an increased confidence, and are unwilling to suppose, come what may, that he can be in fault. I have known a first-rate lawyer, in every other respect

than this, lose valuable clients by merely neglecting to reply to letters of inquiry about business of which he had charge. It does not depend upon the importance of the inquiry in itself considered, but the promptness or otherwise with which his attorney attends to his request. And if he is dissatisfied in this, he is quite sure the next time to select one who does not fail in this respect.

So far as the collection of moneys forms a part of a lawyer's business, promptness and punctuality are indispensable requisites. No man can safely use a client's money, even if he can do it honestly. To withhold it when called for, because he has used it, would be a blow upon his credit which could not be often repeated with impunity. In his essay on Professional Ethics, Judge Sharswood uses this pertinent and forcible language: "It may appear like digressing from our subject to speak of such qualities as attention, accuracy, and punctuality; but, like the minor morals of common life, they are little rills which at times unite and form great rivers. A life of dishonor and obscurity, if not ignominy, has often taken its rise from habits of inattention and procrastination. System is every thing. It can accomplish wonders. By this alone, as by a magic talisman, may time be so economized that business can be attended to, and opportunities saved for study, general reading, exercise, and society."¹

6. In harmony with these wise suggestions, let me add that the place for a lawyer, especially a

¹ Page 66.

young one, is in his office during the regular hours of business, unless when called away by duties connected with his profession. It is there that the client looks for him, and seeks to pour into his ear the story of his difficulties or his wrongs. And here begins one of the earliest lessons the lawyer has to learn, and which is sometimes an irksome and tedious one,—to listen with patience, and at least seeming attention, to statements and details which borrow their color and shape from the state of brain and tone of feeling of the narrator. And if repeated and reiterated to weariness, you are to accept it as one of the incidents of the profession you have chosen.

But if we are to assume that this is by the way of consultation, and that you are thereby called upon to take action or to form and express an opinion, you will find yourselves placed in a situation where you must first act the judge before you can safely take upon yourselves the character of the attorney. Your client presents his case; but he does so at the point of view from which he looks at it, and he expects you are to advise him wisely, although he only sees one side of it. But you will soon learn that every case has two sides; and you will learn too, from experience and observation, that there is, in the calculation of probabilities, such a relation between any given state of things and others which correspond to them, that one can readily infer the one from a knowledge of the other. And when you have heard your client's side of the case, you will be careful to extort from him, however

reluctant he may be to admit it, whatever may limit or control the judgment you are to form. By doing this you may often be able to anticipate the difficulties which are to be overcome in a trial, and guard against surprise, while you prepare yourself to fortify the weak points in your own case. I have been the more particular in speaking of these consultations, because it is not an uncommon experience for a lawyer to find he has awakened a suspicion in the mind of his client that he had been in consultation with his adversary, by the seeming knowledge he has of matters which the client had desired to conceal. And all I wish to be understood as saying is, that in his thoughts and inquiries preliminary to giving advice, or forming and expressing an opinion upon the right of his client to maintain or defend against an action, a lawyer should act as a rigid and impartial judge, if the course to be taken by the client is to be directed by his advice. It is time enough after he has done this to begin to act the advocate and the lawyer; and while he brings every thing he can to bear in favor of his client, he should be careful not to expose the weak points of his case, or to draw out the strength of his adversary.

In the matter of forming opinions and giving advice upon questions submitted to a lawyer, I cannot avoid noting two classes of minds, and two habits of thought and investigation, which are practically exhibited in the profession. One of these, in solving questions submitted to them, have recourse to what has actually been decided, without stopping to inquire

what the rule in the case ought to be. The other class take it up as an original matter, and try to settle how the rule ought to be before they hunt up cases to confirm or correct their first impressions. With the one, a question of law appeals to the memory ; with the other, to the reason and judgment. There is a much better opportunity to make a display of learning by borrowing the authority of decided cases to sustain a conclusion, than by drawing upon one's own judgment and conception of what the rule of law ought to be. While the first may be the safer course if cases can be found in all respects like the one in question, as that is rarely true in regard to matters requiring investigation, the habit of mind of the other class will be found much safer on the whole, if, as should always be insisted upon, a proper examination is, in the end, made into cases to correct, if necessary, the reasoning through which the first conclusion has been reached. And while I should not hesitate to consider the latter habit of mind the more philosophical one, it by no means ignores the value of learning, or dispenses with the use of exact knowledge, in whatever form it can be applied. On the other hand, it gives one who has cultivated it a greater confidence in his own opinions in cases where he is obliged to form them as an original matter of inquiry in which he has no precedents to guide him. Lawyers, sometimes, instead of pursuing the course above suggested, have been willing to follow the lead of the feelings and wishes of their clients ; and have, thereby, got the reputation of " bold practitioners," by the rash and fearless

manner in which they go into a case, trusting to luck and ready wit. If such a course is sometimes necessary, it is far from a wise one for a young man to venture upon. A far wiser course, as it seems to me, is first to form a deliberate judgment of what your client's rights are, and what the probabilities are of his successfully prosecuting or defending a suit, and then state these frankly and fairly to the client, and leave him to decide upon the course to be taken ; and after that give him the full benefit of your best skill and learning, if he desires it.

7. Some go further, and in the management of a case, especially before a jury, pledge for their client their own responsibility for the right and justice of his cause. This is, to say the least, in bad taste, and of doubtful policy, and may be the subject of further remark before I close. All that I wish to say now is, to remind you that, as lawyers, you will have two personalities to act, — that of your client and that of yourself ; and if your own credit and standing as a man is of any value to your client in giving effect to your reasoning, or force to your appeal, you are doing injustice to the next client whom you are to represent, by compromising your own character to aid the present one. You are doing more : you are thereby violating the duty you owe to your profession, if you use the position it affords you to give an additional weight to your personal pledge for any thing which you do not know is right and true. I would go with Lord Brougham in fixing the limits of a counsellor's duty to his client to the extent of

saying, that, so far as his own affections, fears, personal preferences or wishes are concerned, he is bound to ignore them all in favor of his client; but I would add to it the language of another writer, "stopping short only when he comes in conflict with the higher requisites of religion, of morality, or of patriotism." — "The duty of the advocate conscious of his client's guilt is strictly confined to the detection of defects in the evidence offered to convict him, and the suggestion of such legal difficulties as the most guilty has a right to urge."¹

Though this may be thought to be anticipating what might perhaps be more properly said when I come to speak of the manner in which an advocate is to address a court or jury, it seemed to be important to settle in advance what the true relations are between counsel and client, and what the duties are which the lawyer owes to himself and the public as an advocate, a citizen, and a man.

Assuming, as I do, that these several characters and relations are in no sense incompatible with each other, or with the highest duties he owes as a moral and accountable being, I propose next to enter upon what may be called the specialties of practice somewhat more in detail.

8. A preliminary question is often asked as to the place in which a young lawyer had better begin his professional life. It is a question upon which one does not always feel at liberty to follow his own preferences. If one would find business, he must go

¹ 51 Law Mag. 285, 291.

where it is. One might enjoy the quiet and beauty of a rural village and its surroundings, but he would find himself an unnecessary appendage of such a community, if he attempted to live out of the law business which is originated there. It needs trade, exchange, manufactures, and other forms of business negotiations, to give occupation to the conveyancer, to render litigation necessary to settle the controversies and disputes which grow out of failures to perform agreements, or be made a means of construing and enforcing contracts. And it is from sources like these that the lawyer is to draw his support. These are, of course, to be found in greater abundance and variety in our cities than in the country; and it is to these that the greatest number of professional men resort. But it is equally true that more or less of these are also found in many parts of the country; and whether a new beginner shall seek them in one or the other must often depend upon the taste of the individual, or his ability to incur the expense attendant upon waiting for a share of the business which is offered in either. For a man who is wedded to the forms and usages of city life, it would be extreme folly to make his home in one of the new villages of the West, with an idea of waiting for it to grow. Whereas, for a young, hopeful, and enterprising man, whose habits and tastes are not yet fixed, one of these thriving towns is the place of all others for him to be happy in. He feels himself grow and expand with every mark of growth and expansion which he witnesses around him, and associates his own prosperity with that of

the place he lives in. So, between the city and country, there are considerations worthy of attention aside from matters of taste. If one could find any particular place in the country which would furnish business enough, in the aggregate, to occupy and support a young man, it would be likely to be made up of a much greater variety in form and character, than he could expect to meet with, at first, in the city; because of whatever there was, he would be likely to get a share, whereas the business of the cities often becomes divided and classified among the profession. As a consequence, a young man, in a country town, would be more likely to be employed in preparing and conducting cases which originate in his neighborhood, than he would be in a city, where older and more experienced lawyers are equally accessible. Accordingly, it is a matter of familiar observation, that the practice of a country lawyer is much more varied in its character than that of one in the city. He has to be conveyancer, chamber counsel, criminal lawyer, and jury advocate; besides having to do with probate courts, highway commissioners, justices of the peace, and arbitrators, to say nothing of his unpaid services as legal adviser in town affairs, and general counsellor among his neighbors in matters of charity, benevolence, and education. And in this way, he has a decided advantage over his city brother in gaining that knowledge of men which comes from being brought in immediate contact with them in these various relations and associations. So that, so far as knowing men and being known by others is concerned, for

any considerable time after his admission to the bar, the country lawyer has an advantage over one in the city. And this may be turned to profitable account in the end, if, as is often the case, a young man comes to the city, from a country practice, to resume business in a new sphere of activity. There is danger, however, in settling in the country, that a young man may want the stimulus of competition where he is not constantly led to make comparisons between his own progress and capacity and that of competitors and associates; and he is in danger, moreover, of being withdrawn from his professional studies and duties by other less irksome and more attractive pursuits, and thus losing the spur and motive to effort which are so necessary to keep a young man steady to his purpose. Nor is the city lawyer, on the other hand, free from the temptations which beset a young man and hinder him in his progress. While cities are holding out their attractions to young men, and hardly need a word in their favor to commend them to an ambitious lawyer, there is this to be said in favor of the country to one who has not the means of starting in the city, — that if he really intends to train himself for the higher walks of the profession, and a wider sphere of action, and will devote himself to the study of men and things as well as books, so as to gain a knowledge of affairs as well as of law, he need never have any misgiving that he will not in the end be ready, if his ambition eventually leads in that direction, to win the prizes which the city itself holds out to the earnest and able men who enter its arena. But

no general or positive rule can be laid down on the subject.

9. I pass to another inquiry which young men often have occasion to make, and that is whether one had better start alone or form a partnership in business if opportunity offers? Here, too, much depends upon circumstances. Many have not the means of supporting themselves until they can obtain sufficient business to do this, but might be able to do so at once if they could form a connection with an older lawyer. In such a case, necessity supplies the answer. But for one who is otherwise situated, the principal advantage of forming a co-partnership is to furnish an opportunity for engaging in business, whereby he may test his own capacity, obtain confidence in himself and establish it in others. Many a young man of fine talents has failed altogether, from a want of early opportunity; and this is especially true if, from a lack of self-confidence, he shrinks from pressing his claims upon the attention of others. For this reason, if for no other, a chance offer for forming a connection with a partner of established reputation, who will treat a young man as a professional companion, and not as a mere subordinate clerk who works for the pay he earns; who will give him a fair opportunity to take part in the business of the courts, and an opportunity to show to others whatever capacity he possesses,—it certainly would not be wise to refuse it his consideration. But even then he should be sure, before he takes the step, that the

lawyer whom he is to make his partner is worthy of his confidence and respect as a man, and that his tastes and temperament are not incompatible with his own. The relation implies and requires mutual unsuspecting confidence, in the absence of which there is little to recommend its being formed.

10. If now we return to the more specific details of practice, and take them up in something like an orderly manner, we are to bear in mind what I have already said,—that in our country every one may, at times, be called on to act in all the capacities that are represented in England by the different classes into which the profession is divided. Thus conveyancing, which is there a department by itself, is something with which almost every lawyer here has more or less to do. It chiefly relates to the examination of titles, drawing of deeds, wills, and special contracts, and requires a familiar acquaintance with many of the nicer rules of technical law, as well as a pretty wide knowledge of the general principles of jurisprudence. And yet many of our forms of conveyance are so brief and simple, that a notion prevails that almost any one with a tolerable share of good sense may make a deed. By the aid of proper printed blank forms, which can be purchased at a stationer's, this may undoubtedly be true, if there is nothing required but a simple transfer of title from one man to another. But if there is any thing outside of the simplest *formula*, the chance is that a mistake will be committed; and the profession have little cause to object that they are at times

thus curtailed of their fees for drawing instruments, in view of the prolific source of profit they derive from lawsuits which are necessary to explain these instruments, or correct the mistakes into which their writers are liable to fall from ignorance or inattention.

In carrying out the plan which I have traced for myself in these lectures, it would be aside from my purpose to do any thing more than suggest a few hints by way of caution upon the subject of drawing deeds and contracts, since the forms they are to assume may be almost infinitely various. One prolific source of suggestion arises from the provisions of the Statute of Frauds. In the first place, in the creation of all freehold estates, and in some cases of leasehold interests, a deed (except in two or three States) is required to give it validity. In the next place, care is to be observed in the mode of executing deeds and other instruments, especially where it is done through an agent,—first, that he has been created such by an instrument of as high a nature as that which he is to execute; and second, that, when he does execute it, he does it in the name of his principal and as the act of his principal, showing at the same time that it was done by him as agent or attorney, and that it was not his own act. I make this suggestion to obviate a mistake like that which came before the court in Maryland; where the attorney executed a deed “R. G. H., attorney for J. R.,” instead of “J. R. by R. G. H., his attorney,” and it was held not to pass the estate, it not being the deed of J. R.¹ So as to

¹ 1 H. & J. Rep. 709.

having a deed properly attested ; while in some States no subscribing witness is required, in others the law requires two. Another suggestion should never be lost sight of in drawing deeds or any other contracts : that though in some cases courts of equity may correct errors or mistakes by *reforming* an instrument, as it is called, as a general proposition the parties will have to stand by whatever is written in the contract or deed they may execute, although it omit something, or vary from what had been orally stated or understood in their previous negotiations. Nor, in the absence of fraud, will either of them be allowed to contradict or control what is written, except so far as to show the circumstances under which it was done with a view of aiding in its construction. For this reason, as well as for various others, every deed or contract should be so drawn that its parts will explain and construe each other, or at least avoid every thing like inconsistency or contradiction. It often happens that, in drawing an instrument, erasures or interlineations become necessary to express the intention of the parties ; and this suggests the necessity of doing it so as to obviate the objection that, if done by the party in favor of whom it is made after its execution, it will avoid the deed or contract altogether, so far as it is an executory one. All such erasures or interlineations, therefore, should be carefully noted in the attestation clause, before it is signed, or in some part of the instrument above the signature of the party executing it, so as to indicate that it was in the instrument before its execution and delivery.

And I may add, in passing, that no instrument, however formally signed, sealed, or attested, can take effect until its delivery. But I will not undertake now to lay down any definite rules as to what act will constitute the delivery of a deed or instrument.

My remarks thus far have been general in their application to the mode of drawing instruments; and I ought, perhaps, to speak somewhat more specifically of deeds in use in this country. As I have already said, printed blank forms of these are to be found at almost any stationer's. Those in general use in many of the States are indentures, while those in New England are chiefly deeds-poll. By usage, as well as by statute, in some of the States deeds of "quitclaim" are effectual everywhere in passing titles to lands; while the word "grant," used in a deed of conveyance, is sufficient to pass the seisin as well as the grantor's title and interest in the granted premises. It has, moreover, the effect of a covenant for title in some of the States, although it is otherwise in others. It would be a covenant in Iowa: in New York it would not be. With the changes in the law concerning the rights and powers of married women as to their lands, great caution is to be observed in respect to a husband joining with his wife in conveying her land, the laws of the State wherein the land is situated having to be referred to, to determine how far this is required to be done. But this may be assumed as universally true, — that a wife signing a deed with her husband, either to convey her estate or release her right of dower in

his, would be of no effect unless it contain some specific clause of grant or release on her part. While the deed of a married woman, if executed by herself alone, would be void at common law, that of an infant is only voidable, and can only be avoided by him, or some one representing him by law, after his arriving at age. Until then, it is effectual to pass the seisin of an estate. It requires some knowledge of conveyancing to determine when the use of the word "heirs" becomes essential in a deed. Its use may indeed be considered arbitrary and artificial; but it is nevertheless, in some cases, indispensable, if the intention of the deed is to convey an estate of inheritance. This is universally true where the common law prevails, nor will any synonyme or substitute supply it. As where the grant was to a man "and his generation, to endure so long as the waters of the Delaware run," it was held to create an estate for life only, for want of the word "heirs" as a word of limitation.¹ This strictness is, however, done away in some of the States by statute. The disability to convey lands where the owner is out of seisin, which prevails at common law, but has been removed in some of the States by statute, as well as that created by the laws of homestead, where they have been adopted, require the conveyancer to be on his guard that the requisite forms be observed to give effect to a deed which may otherwise be valid. The extent to which this doctrine of homestead rights is carried in several of the States is altogether opposed to the original notions of the

¹ 1 Wash. Rep. C. C. 498.

common law. And a statute of Massachusetts, at one time, prohibited a husband from conveying any portion of his estate, which was covered in part by the right of homestead, unless his wife should join with him in the deed.¹ It practically placed him under her guardianship as to his capacity to convey what was clearly his own; which, although at times it may have been a wise law, was somewhat of a departure from the received notions of the common law.

Another word found in all the forms of deeds in general use, the power and effect of which are little understood or appreciated by those who rely upon printed forms in acting as conveyancers, is the word "use." Thus in the *habendum* of the deed the grantor is to hold the premises "to," (then follows a blank) "their use and behoof for ever." This blank is ordinarily filled with "his," or "their," as there may be one or several grantees, under the vague idea that if a man has bought an estate he ought, of course, to have a right to make use of it. But sometimes it is intended to create a trust in favor of some third person, who is really to have the use and benefit of the estate, while the *legal* ownership shall be in the grantee, and the parties have no intention that the *cestui que trust* should have any control over it. Now the instances are not singular where the conveyancer has sought to reach this end by striking out the words "to their use," and inserting "in trust for" the person intended to be *cestui que trust*; without once suspecting that he had thereby taken away the granted estate

¹ 2 Gray, 383

from the grantee altogether, and given it, unconditionally, to the supposed *cestui que trust*, when in fact such was the effect.

If we pass now from the formal parts of a deed to what is intended to be conveyed by it, we shall perceive the necessity of great care in the description by which the premises are indicated which are to pass by it. A good illustration of this is presented in a reported case. A., by his deed, conveyed "an undivided half of lot 1; also, lot 2; also, an undivided half of lot 3." And A. was prepared to prove that he only sold or intended to convey an undivided half of 2, as of 1 and 3. But the court held that such was not the effect of the language of his deed, and that it passed the whole of that lot.¹ Another caution to be observed is in describing what is intended to be conveyed by a deed by referring therein to what is contained in another. This is often done for sake of brevity and convenience. But it often happens that in the deed referred to there are charges, restrictions, limitations, or conditions, which it was not the intention of the parties to attach to the premises conveyed by the present deed, and might have been readily avoided if the conveyancer had been thoughtful enough to read the deed referred to before adopting its description. I may refer, by way of further illustration, to a mistake which sometimes occurs in those States where joint tenancies are recognized; the great distinction of which is the doctrine of survivorship, but leaving each tenant at liberty to convey his interest in his

¹ 13 Pick, 121.

lifetime if he sees fit. Instead of a grant to A and B. and their heirs, and the survivor of them and the heirs of the survivor, cases have occurred of a grant being made to A. and B. and the survivor of them and his heirs, without the parties suspecting that they had an estate for life only, and that it was a contingent remainder in the survivor.

The mode of creating trusts in lands by deed, and the measure of their duration, is a matter of growing interest in the conveyance of lands, and would be referred to here if it did not open too broad a subject to be treated of in this connection. So is that of springing and shifting uses, in their application to marriage settlements, so universally in use in England, and becoming more frequent in our own country. But I pass them both by, to repeat that the rule of the common law requiring conveyances to be by deed, which implies a sealed instrument, is changed in several of the States so as to dispense with a seal; while a different rule prevails in different States as to what shall constitute a seal, a scroll supplying in some of them the form required by the common law.

A single hint may be of use to one who may have occasion to trace the title to an estate, which counsel often have to do, in reference to conveying it. Generally an unbroken possession and ownership in any one person, or a succession of owners for twenty years, is considered a satisfactory evidence of title, and the records of titles are rarely examined for a longer period where a conveyance is about to be made. But as outstanding mortgages and charges

of annuities and the like may be valid for a longer period than twenty years, an apparently clear title for that length of time is not always a reliable one. Cases have occurred, too, where an apparently unbroken chain of title has proved deceptive by reason of the doctrine of estoppel, which sometimes intervenes. Thus, suppose A. is in possession under a deed from B., which is duly recorded; and B.'s deed from C. also appears upon the record, and no intervening deed has been made by B. to any one between the date of his deed from C. and the time at which A. proposes to convey. One would suppose that there could be no risk in accepting a title thus traced in unbroken line from C. And yet if B., before purchasing of C., had conveyed the same land to another party, with covenants of warranty, who had duly recorded his deed, he would, by the doctrine of estoppel, take precedence of A. in the matter of title, and defeat the estate thereby supposed to be acquired by A.¹

I have spoken of the indispensable necessity of a delivery of a deed to its taking effect as such. But it is far from easy to define, by any general rule, what amounts to a delivery. The cases are too numerous to cite in detail; and I will only venture to suggest that one idea seems to stand out pretty prominently in them all,—that if a party make a deed and put it out of his own possession and control into that of another, for the purpose of having it delivered to the grantee, unless it is by the way of an escrow, the same will be an effectual delivery

¹ 24 Pick, 324.

when known and assented to by the grantee, although the grantor never saw the grantee or held any communication with him. If delivered as an escrow, and the grantee get possession of it without having performed the condition, it would not be of any validity to pass the title.

Questions sometimes arise as to the effect of recitals in deeds-poll of something to be done, by the grantee named therein, and how far he is bound by accepting such deed, inasmuch as he never has signed it. As a general proposition, he would be as effectually bound to keep and perform the agreement as if he were in form a contracting party.¹ This, however, is merely preliminary to a point of much more difficulty, arising from the mode in which conveyances are often made of estates that are subject to existing mortgages, and it is intended that the purchaser shall assume the payment of the outstanding mortgage. The question, in such cases, generally is, how far the purchaser assumes the payment of the debt thereby secured, so as to be personally liable therefor to the mortgagee. If he simply purchases the estate subject to the mortgage, he has the election whether to redeem the estate or let the mortgage be foreclosed against him. But there is such a discrepancy between the cases upon the subject, that it is difficult to say how strong the recital in the deed of purchase must be, implying an agreement on the part of the purchaser to assume and pay the debt, in order to render him personally liable for the same, as his own debt, to

¹ 9 Mass. 510.

the holder of the security. If such is the purchaser's intention, it should be clearly so expressed; while if such is not his intention, the recital in the deed, for the sake of his security, should as clearly leave an election of paying it on his part.

It should be borne in mind by the conveyancer, that the covenants in a deed are no part of the act of passing a title by it, and are only designed to guarantee or protect the title which the granting part of the deed has assumed to convey. This has an important bearing upon the effect of covenants entered into in deeds where the grantors act in an official capacity, as executors, administrators, guardians, and the like, who are empowered by license of courts or the instruments creating the trusts to convey the lands of other persons. The same rule applies in case of agents undertaking to act for their principals, who exceed their authority. They make themselves personally liable for whatever they undertake beyond the scope of their authority. Thus, where an administrator, authorized to convey lands, entered into covenants in the deed that his intestate was seised of the same, and that he, "as administrator," would warrant and defend the title, and the same turned out to be defective, it was held that he was personally liable to make good the warranty; because, as administrator, he had no power or authority to enter into such covenant.¹ And where a guardian of a minor signed a note "as guardian of A. B.," it was held that he thereby bound himself personally.²

¹ 8 Mass. 162, 189.

² 6 Mass. 58.

Much that I have said of deeds applies equally to leases. Different States have different laws as to requiring leases to be under seal, in order to be effectual. The same is true as to their being recorded. It is often difficult to construe a contract between parties which relates to the letting of land upon hire, so as to settle whether it amounts to a lease, or is a mere agreement for a lease. It is often extremely important in its bearing upon the rights of the parties whether it is the one or the other. If it is a lease, and nothing is said of the duties of the lessee, the law comes in and *implies* sundry covenants, which he is supposed to adopt and make his own. And the same is true as to the lessor. Whereas, if it is a mere agreement for a lease, it only binds the parties to do what is expressed therein. The matter of covenants in leases is of great practical importance; and yet, from the loose and unguarded manner in which they are entered into, little heed is at times paid to what is embraced in them. Such is the case as to the premises being in a tenantable condition, or being suited to the purposes for which they are let; so as to liability to repair if injured or destroyed, or to pay rent if rendered untenable by tempest or fire and the like. All these things should be carefully anticipated and guarded by proper stipulations in the lease, instead of leaving it to inference and implication. So the lessor should secure himself against breaches of covenant by the tenant as to the use to be made of the premises by the latter, or his assigning or underletting them, for the payment of rents and the like, by inserting

proper *conditions* in the lease by which he may re-enter and determine the same.

A single word is all I have space for on the subject of Last Wills and Testaments. The law is far less stringent in matters of form in respect to these than to most legal instruments, because they often have to be made under circumstances which preclude professional aid. But there are a few important suggestions which should be borne in mind by any one who undertakes to draw such an instrument. The laws of different States differ as to the ages at which testators are competent to execute wills; though, generally, the age prescribed is twenty-one years. In some States, married women can make wills in the same manner as if they were sole. In others, it is necessary that the husband should assent, in order to its becoming valid. These are in their nature preliminary questions, and are first to be settled. In the next place whatever the testator wishes to give, or directs to be done, must be clearly stated in the will itself, or by express reference to some other existing paper which can be identified. So he must clearly indicate thereby the objects of his intended bounty, or state enough to identify or ascertain who are to take as legatees or devisees under his will. These are points in which if a will is defective, it cannot be supplied by parol testimony, unless it be in some cases of latent ambiguity, such as naming a legatee when there are two persons of the same name: evidence is admissible to show which of these he intended.

Under the statutes of charitable uses, so called,

provision is made whereby devises are allowed to take effect, although the devisees are not specifically named; but take, if at all, by reason of coming under a certain class of individuals, such as the poor, sick soldiers, free schools, and the like, where the law comes in and supplies proper persons to hold and manage the property thus devised. In some of the States, seals are required to render wills valid; and in all witnesses are requisite, though the laws of the different States vary as to the number which they require. But the point upon which more wills fail than any other is in undertaking to create secondary estates, that are to come in and take the place of prior ones, which, by their terms, may fail by the happening of some event; as, where the testator gives an estate to a son or daughter in fee with a devise over to some third person, if such first-named devisee should die without having a child or issue living at his or her death. Such secondary estate is called an executory devise; and one condition of its being a valid one is, that it *must*, if it take effect at all, do so within what is called "the rule of perpetuity." An instance of a failure of an estate to take effect for such cause is found in 3 Gray, 142; and I recently heard a distinguished counsellor say, that of five wills of large estates, which had recently been submitted for his examination, three of them were clearly void as to the estates they attempted to create in the way of executory devises. And as to the other two, the question was too doubtful for counsel to advise confidently upon the point

of remoteness of the estates intended thus to be created.

If I were to speak of contracts generally, and the requisite forms to be observed in drawing them, I could say little more than that they are so various and multiform in their character, that nothing beyond general rules and suggestions could be made upon the subject. Books of form are always accessible, which may serve as precedents in respect to many of these, as well as of deeds, leases, and the like, which are often convenient for reference, by way of hints and suggestions in framing new instruments and business papers. But no one can feel safe in doing this without a pretty accurate knowledge of the principles upon which contracts and agreements are framed. And in the absence of a settled and prescribed form to guide one, I know no safer rule than to state the agreement of the parties in their own plain and intelligible language, with as few technical terms and phrases as possible, in order to answer the desired purpose. This may, ordinarily, be safely done upon the principle that courts construe contracts so as to effectuate the intention of the parties where this is intelligibly expressed.

I might make one other suggestion as to drawing deeds, contracts, and the like, if it did not threaten to throw that part of a lawyer's business into the hands of a favored few ; and that is, that they should be written in plain and legible handwriting, though, with too many of the profession, I fear chirography is little better than a lost art.

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I wish, however, to repeat here, that the only purpose I had in saying what I have of the special business of a conveyancer was by way of *hints* as to the matters that should be kept in mind when executing a commission which often becomes mechanical, and at times calls for prompt and hurried action, and not with any pretence of furnishing a key to guide any one in framing a legal instrument. Though I hope what I have said may be sufficient to suggest that to be a good conveyancer requires learning, skill, accuracy, and good sense; and that, of all economy, that is the least profitable which employs an incompetent conveyancer, because he works cheaply, and then having to pay a lawyer to rectify his blunders and mistakes at the end of a lawsuit.

11. I have already spoken of the mode of investigating questions of law with a view to forming opinions upon those which others may have to follow; but, before entering upon the proper business of a lawyer in court, I wish to add to what I have said a few words upon the opinions he may have to form and express as to matters outside of what is strictly professional. I do this because a lawyer's intercourse with those around him is chiefly with men who have little occasion to communicate with him professionally. Indeed, a majority in every community go through the world without ever having had a legal difficulty, much less a lawsuit, in their lives. And yet, few of them do not at some time need the advice of one who understands how to

direct them in legal matters. To such men, the lawyer of the village or the neighborhood becomes a kind of oracle to be consulted on all subjects and upon all occasions. This is especially true as to town and other civil officers, administrators, executors, and trustees, arbitrators and commissioners, with various powers. Such is the case, too, with men in business, who, without any interest in the matter, are curious to settle this or that hypothetical inquiry. Some of these are cases where the party who consults with the lawyer is willing to pay a fee, but more frequently he expects an answer upon the same terms as he would ask the advice of a neighbor how to treat a cold, or whether he had better buy his coal or sell his corn in the present state of the market. The lawyer, in such a case, has to act the part of a citizen, and to look for his compensation in the command he acquires over the confidence of his neighbors, and the claims he thereby establishes upon their business in the law, whenever they have any. It is in this way that so many lawyers become the best of peacemakers in a community, since there grows up, almost as a matter of course, a confidential relation between them and their neighbors as to other matters than professional disclosures. And in that way a lawyer wields an almost unconscious influence, which only needs to be wisely directed to become at the same time salutary and powerful.

What I wish to impress upon your mind is, the value and importance of such a confidence as I have here been speaking of. It is indeed "a plant of slow growth," but with prudence and integrity it

may be fostered to become a vigorous and healthy one. The law will not allow you to disclose your clients' confidential communications, if you would, and you may gather from this a hint of what is wise as to whatever comes to your ear in confidence from any source. If your habit of life is never to repeat what is said to you by a client, or in your office, which is in any sense confidential, your honor will always be safe, and your caution and prudence will command for you the confidence and respect which it should ever be your aim to secure.

12. In giving advice upon matters of a properly professional character, the first thing to be observed is to be sure that you understand all the facts which bear upon the question you are to answer. It is not enough to depend upon what the client happens to state, since he may often omit important facts through inadvertence and from being unaware that they are important. It is only after careful cross-examination of a client that you can feel safe in advising him, upon a matter upon which you are consulted. If he deceives or misleads you in respect to these, it relieves you from fault or censure, though your advice may mislead him. For the same reason if you have papers to depend upon in forming an opinion, never take a statement of their contents at second hand, if they can be had for a personal inspection; since a single word may often materially affect the construction of an entire instrument. Let me suggest further, that, when called upon for advice, it is better to take time for examination of

the questions submitted to you, to be sure that your first impressions are well sustained, than to attempt to gain a reputation for smartness and ready learning by a more prompt and positive expression of an opinion. And be careful for your own sake, as well as that of your client, to deal frankly and fairly with him in whatever advice or opinion you do give ; so that if acting upon it he brings or defends an action and fails, he cannot, as he will be always inclined to do, throw the blame of his want of success upon your having misled him. If his case is doubtful, let him so understand it fully before he starts, and then if you do your duty no censure can rest upon you. The importance of care and thoroughness in giving chamber counsel reaches beyond the particular question to be investigated, or the client who is to be affected by it. It has its effect upon the habit of one's mind, which aids him essentially in his business in court. If he accustoms himself to analyze and examine the processes by which he reaches his conclusions, so as to understand the steps by which he does it, he is prepared to explain it to another, and thus supply important links in the chain of reasoning which he might otherwise have failed to detect. Every judge has felt the importance of this when listening to the arguments of counsel ; and it is for that reason, that a sensible judge is always unwilling to decide a question, until he has heard it fully argued on both sides.

Although I have more than once alluded to the avenues to business and emolument that lie outside of the proper scope of the profession, which a law-

yer's training and education often open for him, — those places of trust and responsibility, requiring good judgment, fidelity, and accuracy in details, to which the public call him, thereby involuntarily paying a tribute to the profession as a class, — it is not my intention to go beyond the proper business of an attorney and counsellor. To do this with any thing like completeness requires me to begin, where every lawyer has to begin, with matters of trifling importance. He early learns that to mount the ladder of preferment he must start at the bottom, unless he is so situated that somebody else will carry him at once over some of the first and hardest steps which most have to surmount for themselves. But the training that one gets in a police court may help to fit him to make his way in the highest court of the land. And the skill and good judgment displayed in the conduct of a case of twenty dollars' consequence may go far to satisfy those who have business to be done, that he is safe to be intrusted with one of ten or twenty times that amount.

13. I am induced to renew these observations because of the false sense of dignity which deters some young men from engaging in a second or third rate practice. After having devoted years to qualify themselves for something higher, they shrink from encountering the rough passages of a magistrate's court, or the defence of a seedy-looking client who is charged with cheating or petty larceny. They choose to wait for some cause of magnitude and importance in which their learning can tell, and

where success would be a triumph worth coveting. But, alas for such men! it is a waiting upon the river's brink until it shall have run by; and after waiting for a *pick* of causes, they are left behind by their fellows, who are in the mean time able to command a business by having shown that they might be safely trusted to manage whatever they undertook.

The kind of business of which I have spoken is, ordinarily, uninviting if not actually distasteful; and, as a consequence, lawyers who can follow their own preferences are unwilling to undertake it. The chief use that a young man can make of it is in the opportunity it gives him to acquire tact and self-possession in the management of causes, together with skill in the examination of witnesses, and a ready habit of combining and arranging his facts and reasons in an orderly sequence. Such business, in that way, becomes a stepping-stone, as it were, to higher places in the profession. And while I would never engage in any thing which bordered upon meanness or dishonesty, I can see reasons why a young man would do well to waive matters of taste, and undertake the defence of a criminal who desires it, even if his case looks ever so desperate. There is one pleasant circumstance about such a defence which does not apply in many other cases. In most of these, the feelings of counsel become enlisted; and a decision against him he feels doing a wrong to himself as well as his client, and something like self-reproach for the manner in which he has acquitted himself sometimes aggravates his defeat.

Whereas, if one feels that justice has probably been meted out to his client, he has no occasion to lose sleep because the verdict has been against him; nor are his sensibilities wounded to hear sentence pronounced upon one whom he has done what he could to save. But if, on the other hand, he is satisfied that his client is innocent, and is in danger of being sacrificed to a conspiracy or an unfortunate combination of circumstances, no matter how poor or friendless he may be, the mission of the advocate rises to the dignity of a minister of justice, and is scarcely second to any other in honor or responsibility. In such a case, he should spare nothing to vindicate his client's innocence. He should be deaf to the clamor of the masses, and let popular prejudice spend itself, as it will be sure to do in the end, while he marches right on to the struggle which has been forced upon him.

The history of criminal jurisprudence is full of instances of acts done where the element of crime,—intelligent intention,—has been wanting, and of imaginary crimes confessed where none had been committed. These often present questions of great difficulty, which it becomes the duty of counsel to reconcile and explain to the minds of juries unaccustomed to such investigations. To do so requires an intimate knowledge of the laws and science of psychology, which it is difficult to communicate to those who have never made it a study. While men at times have undoubtedly escaped by feigning insanity, at others a phrensy of excitement in the public mind, in itself little if any thing short

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of insanity, has pursued the object of it to conviction, for crimes of which he was as innocent of guilty intention as the dreamer is of the vagaries of his brain in sleep. The acquittal of Hadfield was a triumph of profound sagacity, learning, eloquence, and courage on the part of Mr. Erskine over the passions of an excited populace, which will ever be memorable in the history of the English bar. And an achievement, scarcely less honorable to the American bar, is told of Mr. Seward, when he stood up without a fee in defence of a friendless negro, and wrung from a reluctant jury an acquittal by demonstrating his insanity. On the other hand, courts and juries have rarely, if ever, given way to that theory which pronounces a man innocent of crime on the ground that an excess of the normal limits of atrocity in crime is to be accepted as evidence of moral insanity, and relieves the perpetrator of the act from an imputation of guilt.

Of the instances of what Mr. Wharton calls "involuntary confessions," which he applies to cases where innocent persons have confessed themselves guilty of crimes, the cases are neither few nor rare. Writers have attempted to account for this phenomenon, and to explain it under the laws of psychology. But I have only to speak of it as a fact, without attempting to reconcile it with the general course of human experience. In a discussion of the subject, under the title which I have above quoted, Mr. Wharton has collected a variety of instances, where such confessions have occurred; among which is the memorable one of the Bournes

in Vermont, who were tried and convicted upon their confession of having murdered a man who was at that moment alive, and appeared upon the stage in person in time to save them from execution. The existence of such facts is enough to suggest to every lawyer, against whose client a confession is urged, a careful, searching, and rigid inquiry into the circumstances under which it was made, and the condition of mind in which the party making it was at the time. If it was made under an expectation of favor, or extorted by fear, or under a delusion, it is a mockery of justice to base a verdict upon it, and should be resisted accordingly.

While I am upon the subject of criminal practice I ought, perhaps, to hint at the importance and advantage of your carefully examining the complaint or indictment upon which a client may be arraigned, before he has occasion to plead to it. Some defects and objections must be taken advantage of, if at all, before he pleads generally "not guilty" to the charge. Such is the case of a misnomer. It can only be taken advantage of by a plea in abatement. And, here again, the counsel should recollect the hazard he incurs by such a plea, if the offence charged is a misdemeanor only. If it should turn out that he is complained of or indicted by the name that belongs to him, and the jury should say so by their verdict, the whole charge is taken for confessed, and he stands convicted accordingly. Sometimes the indictment is so defective in its form and allegations that it may all be true, as therein stated, and yet no crime have been committed.

Such an objection would be fatal by way of arrest of judgment, even if the finding of the jury were against the prisoner. It is well, therefore, to consider beforehand whether to object to the indictment and give the prosecuting officer a chance to correct it by a *nol. pros.*, as it is called, and thereby compel the defendant to answer to a new indictment; or to go on with the trial, which will be a waiver of many matters of form, and run a chance to get a verdict in his favor, relying upon a chance to move in arrest of judgment if the verdict should be against him.

It often becomes a turning point in a client's case whether the prosecution in a criminal matter, if, for example, it finds the evidence against the prisoner defective, can stop proceedings by entering a *nol. pros.*, and thereby leave a door open for a new process, or shall be obliged to go on at the hazard of a verdict in favor of the defendant, which will operate as a bar to future proceedings for the same alleged cause of complaint. And the rule seems to be this: if the trial has gone so far that the defendant has been arraigned and has pleaded to the indictment, and a jury has thereupon been impanelled to try him, the government cannot stop proceedings, and thereby prevent a verdict being rendered, by entering a *nol. pros.*, if this course is objected to by the defendant.¹ I leave this matter here without pretending to point out what would be defects in the forms of indictments, or what it is necessary to aver in charging crimes therein; since to do so would require me to transcend the limits to which I must confine myself.

¹ 20 Peck, 365.

LECTURE VI.

PRACTICE. — *Continued.*

1. Collecting Money. — 2. Commencing Actions and Preparing for Trial. — 3. Drawing Pleadings. — 4. Judge or Jury in Trying Issues. — 5. Opening Case to Jury. — 6. Introducing Witnesses. — 7. Different Classes of Witnesses. — 8. Order of Evidence and Witnesses. — 9. Examination of Witnesses.

1. Among the departments of a lawyer's practice which the new beginner often shared with the older members of the profession, was that of collecting moneys. I speak of it as something past, not because it is not now done at times, but the course of business in the country, in respect to prompt payments, has greatly curtailed this source of a lawyer's income, and the passage of a general bankrupt law has done much to cut it off altogether. It never required great learning or skill, but chiefly depended upon careful attention and promptness, which any young man could easily exercise.

Whatever in such cases is to be done is a matter of detail; such as suing out process in proper form, having it properly served, entering it at court, and seeing that a correct judgment is entered, and then filing the necessary papers and obtaining execution, which is to be placed in due time in an officer's hands to be enforced. And where this has been once done, a repetition of it is little more than mechanical. And

I need only repeat what I have before said, that if a lawyer has thus collected moneys for a client, it is quite as much his interest as it is his duty to pay it over, when called upon, without hesitation or delay.

2. The commencing of an action which promises to result in a contested question of law or fact involves a preliminary preparation altogether different from what is required for the mere collection of an uncontested claim for money due. To do this, as it should be, implies not only a knowledge of what the law upon the subject is, but of the details of form which are required in putting the case into shape for trying it, and in carrying through a trial in all its stages. In England much of the duty and responsibility of doing this is divided between the attorney and the barrister, whereas here the same lawyer has to perform the duties of both. This, of course, requires, as a preliminary step, a thorough and searching inquiry and examination into the grounds upon which the cause of your client is to rest, not only as to what can be proved in his favor, but what can be proved upon the other side.

Many a cause has been lost by neglecting this hint of looking into an adversary's case from the point of probability, and being prepared for whatever contingency may arise as to his adopting any one of several lines of attack or defence. Let me illustrate this by a single example. A debtor in failing circumstances conveyed his property to another, who took it into his possession. A creditor believing it to have been fraudulently done, and

knowing that the only witness, as the law then stood, who could testify in the case as to the sale was the original vendor, caused the same to be attached by an officer, believing he could destroy the credit of this witness. The vendee thereupon brought trespass against the officer, and the attaching creditor undertook to defend. His counsel, knowing that the whole merits of the case depended upon the testimony of this one witness, and that his reputation for truth was exceedingly bad, appeared in court with some twenty witnesses prepared to overwhelm the plaintiff's witness, and confidently counted upon an easy victory. He had not taken the precaution to see if the plaintiff could escape in any way calling this witness; and so, when he called an indifferent witness to show the fact that the sheriff had taken the property in question *out of his possession*, and there left his case without calling his chief witness, the defendant found himself utterly unprepared to meet that part of the case, and was compelled to submit to a verdict without an opportunity to call one of his formidable array of witnesses.

Not only should counsel know what witnesses he may call and the points to which they are to testify, but he should, if possible, see them himself, that he may judge how far they can be relied on to establish the facts which he proposes to prove by them.

Another hint to be regarded is, if the testimony of a witness is to bear upon precise dates, sums, or forms of expression, it should be taken down in the words of the witness, that there may be no discrepancy between the allegations in the declaration or

plea, and the evidence by which it is to be established. This is especially important in actions for words spoken, or upon oral contracts. So if the case requires the production of deeds, letters, or other documentary evidence, these should, if possible, be seen and examined, and, if need be, extracts made before the declaration or plea is drawn, that the one may sustain the other.

In the trial of a real action for the recovery of land, it often becomes necessary to go beyond the immediate title of the demandant or tenant. In such a case, therefore, it is often all but indispensable that the counsel should, from his own inspection, prepare an abstract of his client's title, to see that there are no links wanting, no deficiency in proof to be supplied; and be prepared to meet such objections as that some grantor in this line of title is alleged to have been disseised when he made his deed, or had conveyed his estate by a previous recorded deed and the like.

The best time to supply defects in a chain of titles is before the adverse party, or an unwilling witness, has been put upon his guard by the commencement of an action involving the inquiry. By taking these precautions, moreover, the counsel silences all cavil and criticism which the client might otherwise indulge in, if his case fails in the end by some unexpected defect in the proof. For, let me again remind you, it is sometimes a convenient makeshift on the part of a losing party to throw the fault upon his counsel rather than upon the intrinsic weakness of his own case.

If after an examination and investigation, such as I have mentioned, the counsel should be of opinion that the facts would sustain an action, the next step is to determine what the form of such action shall be. Upon the point of ultimately sustaining an action, there may be different degrees of certainty in the mind of counsel; and, in forming judgment, he is often obliged to weigh carefully other cases which bear upon the question he has to decide, to see how far he is sustained by analogy between them; and sometimes he is obliged, from the want of any such analogy, to fall back upon first principles,—as, for instance, that where the law recognizes or creates a legal right, it provides a remedy if it is violated.¹ This doctrine was illustrated and applied in the somewhat famous case, in its day, of *Paisley v. Freeman*,² which rested wholly upon general principles, without any support from decided cases. In forming a judgment, therefore, upon this part of his case, counsel must rely upon his own power of discrimination and generalization, quite as much as upon his learning. But when he has once made up his mind that an action of some kind will lie, it is not, in the present state of the law, generally very difficult to determine the form to be adopted. In several of the States, assumpsit, debt, and covenant have been merged into one under the name of an *action of contract*; while trespass, trover, and case are made to take the name of an *action of tort*.

Having, then, concluded as to the form of the action, his next step is to apply to it the proper

¹ 1 Chitty Plead. 85.

² 3 T. R. 51.

formulas of process and declaration. There is, ordinarily, little difficulty in drawing the requisite writ, provided due care is taken in the matter of the parties to the action. If, for instance, the plaintiff sues in a representative capacity, he should be so described; and if an infant be the plaintiff, some responsible name should be associated with his or his "next friend," to be responsible for costs, if the action should fail. But to frame a proper declaration assumes a knowledge of pleading which is derived from a considerable familiarity with many of the leading principles of the law.

3. Pleading, as a department of legal science, involves an extent of knowledge and a degree of technical accuracy in statement, which give to it many of the qualities of an exact science. But though it has lost, in most of the States, many of its technicalities, it still retains most of the elements of pure logic, for which it has ever been distinguished. The purpose of a declaration is to state the ground of the plaintiff's claim in so clear and distinct a manner, that the court can thereby see that the defendant has done him a legal injury, if the facts therein stated are verified, and for which the law will give him a remedy and redress. It consists, in other words, of a statement of facts, which ought properly to exclude every thing that is foreign or extraneous to the principal fact to be established, and ought to show upon its face that the plaintiff has a good and sufficient legal cause of action against the defendant.

The law, from an early day, prescribed forms in which these should be made, depending upon the nature of the supposed wrong to be redressed. If it was for violating a promise by the non-payment of money, it took one form; if it was a personal injury from some act of violence, another; and if it was the converting of property wrongfully, still another. To these were added forms less specific in their nature, but such as became established by usage, which it became necessary to observe and follow, subject to the modifications which the circumstances of particular cases rendered necessary, in order to carry out the idea of a full and clear statement of every fact that was essential to the sustaining of the action. The same, as we shall see, was true of the forms in which defendants denied the plaintiffs' right to maintain their actions, which the law called their pleas.

To know how to do this properly and scientifically, what to state and what to omit, what would form the basis of an action or the grounds of defence, and to state the same accordingly, implies not only a general familiarity with legal principles on the part of the pleader, but a knowledge of the precise and technical rules to be observed in applying them, and the facts upon which the party pleading rests his case.

To one unacquainted with special pleading, it would be difficult to convey an idea of the almost infinite variety of forms which had practically grown up in course of the progress of common-law proceedings in the English courts, before the late changes

which have been adopted there. But some notion of this may be formed from a collection of these filling ten good-sized volumes, published by Mr. Wentworth, the title of which is: "A Complete System of Pleading, comprehending the most approved Precedents and Forms of Practice." Without troubling you with any one of these, I need only remind you that, from the law which holds that as conclusively settled which has been decided and adjudged by a court of competent jurisdiction, the record of every case should state fully and precisely what the court did decide; and this is chiefly made up of the statements in writing on the one side and the other, which constitute the pleadings in the case. So refined and technical did these sometimes become in raising the points which it was intended to submit to the court or jury, that parties often got mystified by the subtleties into which one side or the other had been led, and were subjected to heavy costs in correcting a mistake, or suffered the loss of a good cause by bad pleading.

This, with a growing liberality or laxity on the part of the courts, led to a disposition to reform and simplify the system; and the attempt to do this has met with more or less success within the last few years, both in England and our own country. So that while a few States still retain the common-law forms of pleading, most of the others have devised "Codes of Practice," in which many of the principles of the old system are retained, while new forms and processes for commencing and carrying on actions to final judgment have taken the place of those

once in use. How far this has been a simplifying of proceedings may, perhaps, be readily answered when the fifty or sixty volumes of Practice Cases, which have been issued by the courts of New York since 1849, shall, with those yet to come, have given to the code of that State something like efficiency and completeness.

But, with all this tendency to laxness and liberality in practice, in accordance with the spirit of what is called reform in the law, something answering to a declaration in writing must be framed, in which the plaintiff sets forth wherein he is injured, for what he seeks relief in court ; and this must be so stated that the court, upon inspecting it, will see that, if the facts set forth therein are proved, the plaintiff has a legal and sufficient cause of action and claim to redress.

Here, then, we have a simple and intelligible clew for a young lawyer to follow in commencing an action. After ascertaining his facts, and having settled in his own mind whether they form a good and sufficient cause of action, he is next to decide in what form of action his remedy is to be sought ; and then to put his statement of facts into a written form so clearly and distinctly that the court may, by reading it, and without a word of explanation, *aliunde*, judge whether the plaintiff has a good cause of action, and if it be within its cognizance. In drawing such a declaration, though I would not advise you to follow implicitly any book of forms, but to tax rather your own good sense of how it should be done, it is well to have one of these forms before you, to which you

can refer by way of hint, to avoid any omission of the more technical and formal terms and phrases which sometimes escape the attention of even good pleaders.

Much that I have said of the mode of framing declarations applies with equal force to pleas, replications, and the like. The pleader first ascertains his facts; he next judges of their materiality and effect; and, after this has been done, he proceeds to put them into form, so as to show cause why what the adverse party claims or asks for, ought not to be granted or allowed. This, as I have already suggested, may take a great variety of forms. It may deny what is averred on the opposite side, or rest the pleader's case upon the insufficiency of his adversary's claim as it appears in his written statement of it, or it may set forth some new fact, which, if true, is a bar to what the other party claims.

As the original purpose of pleading, beyond the statement of the plaintiff's claim, was to ascertain in what respects, and as to what points, the parties disagree, in order to limit the inquiry of the court and jury to that particular matter, it was assumed that what was averred on the one side and not denied on the other should be taken to be true. Another rule intended to reduce these inquiries to their simplest form was, that, if one party had more than one answer to make to what was averred on the other side, he should select some one of these, and rest his defence upon that alone. It was in some one of these ways that what the law calls an issue was raised between the parties, something material to

a right judgment in the case being affirmed on one side, and denied upon the other. And, as I have just said, it was a rule of pleading that only a single issue should be raised in the trial of a case. But a rule so obviously unequal and unjust was at last corrected by a statute in the time of Anne,¹ which authorized the pleading of as many several pleas as the defendant saw fit. What were formerly called pleas take the name of answers in modern codes ; but the same principle applies to both.

In modern practice, a large proportion of the questions to be tried by juries, are raised by what is called a "general issue," which consists of a general denial of what the plaintiff affirms in his declaration to be true. This of course requires the plaintiff to establish his affirmation by proof, before the defendant can be called on to show any thing on his side. Whoever makes the affirmation by a denial of which the issue is raised is bound to go forward, and prove his allegation, before the other party is required to offer any proof to the contrary. These are issues of fact, upon which a jury, ordinarily, has to pass. But there are issues at law, where the parties admitting the facts to be true, as they are stated in the pleadings, are at issue with each other upon the point, whether these are sufficient, in law, to ground an action or defence upon ; and these issues are decided by the court without the aid of a jury. The name of "demurrer" is given to this class of issues, which distinguishes them from pleas in bar, which are intended to raise issues in fact for the jury. A special,

¹ Stephen, 321.

to distinguish it from a general issue is one where the object is to establish some particular fact, upon which a party may rely to meet the claim set up on the other side, and a verdict upon which is, ordinarily, as effectual as if rendered upon a general issue. Suppose, for a familiar illustration, that A. sues B. in trespass for breaking and entering his close, and cutting down a tree, and B., by way of plea says that A. gave him a license to cut it. By so doing, he admits it to be A.'s close, and that he did enter it and did cut the tree and he rests his whole defence upon the fact of the license. But this he has got to establish, and if he fails to do so, there will be a verdict against him ; and if he succeeds he shows thereby, that the plaintiff has no cause of action ; or, we may suppose, to his plea of license the plaintiff may reply that the same had been revoked, when the whole case would turn, at last, upon the point of such revocation.

In many cases of legal controversy, the question is not one of liability generally, but of the amount due. This suggests what often becomes an important incident to a trial in court, the privilege of *tendering* whatever a party admits to be due, and thereby saving the costs to which he would be subjected, if the plaintiff in such an action recovered any part of his claim ; and, instead of having to pay costs, he would recover costs of his adversary. Thus suppose A. claims of B., as due him, the sum of one hundred dollars, and B. is willing to admit his indebtedness to the extent of sixty dollars. If he suffers A. to sue him, and, upon a trial, A. fails

to make good his claim for one hundred, but does show sixty dollars to be due him, he would recover of B. not only the sixty dollars, but the costs of the suit also; whereas, if, before such suit had been commenced, B. had tendered to A. the sixty dollars, and A. had seen fit to prosecute his claim for the hundred, and failed to recover more than the sum which had been tendered, he not only would recover no costs, but would have to pay B. his cost incurred in defending the suit. So, if after the suit had been commenced, B. had "paid into court," as it is called, the sum of sixty dollars, and offered to pay the costs which had been incurred up to that time, A. would pursue his action further at the peril of paying all subsequent costs, if he failed to recover more than the sum thus paid into court. The mode of doing this is very simple, and needs but a single hint or two. If done before suit, the offer of money should be absolute and unconditional; and if it is paid into court, it is done by a written statement that he brings so much money into court for the use of the plaintiff, and an offer to pay the costs if the plaintiff will tax them, and this with the money he deposits with the clerk of the court. But the counsel should bear in mind, that, by such a tender, in either form, he admits that the plaintiff has a cause of action to that amount. So that, if he really means to contest the plaintiff's right altogether, he cannot safely attempt to guard himself against costs by offering a sum of money as his due.

There are other cases where a party who has been sued will have occasion to take certain prelimi-

nary measures in the way of anticipating a prospective action against some third person. Such cases may and often do occur where property has been sold from one to another with a warranty as to title or quality. It more frequently occurs in respect to suits upon covenants of warranty of title in deeds of real estate. A. conveys to B. with such covenants, and B. to C. with like covenants. C. is ousted by a stranger having paramount title, and thereupon sues B. upon his covenant. If B. is wise, he at once notifies A. or has him summoned into court to defend C.'s suit. And if he fails to do so, B. defends as well as he can; and if judgment is rendered against him, he may have an action against A., and in it may rely for his proof upon the judgment of C. against him, and not only recover what C. recovered against him, but the costs also to which he was subjected in defending the former action. I need not, therefore, remind any one who stands related as counsel to a party under such circumstances of what his duty to his client would require of him.¹

4. Before taking up the subject of the modes of proof by which parties to an action are to establish the facts which are averred by them in their pleadings, I ought, perhaps, to say something of the respective powers and functions of the judge and jury in the trial and decision of questions that come before a court. The general rule applicable in such cases is a familiar and well settled one, that it is

¹ 7 Lamb. 152; 5 Wend. 538; Rawle Cov. 230.

the province of the judge to determine all matters of law, and of the jury to decide questions of fact. But it is not always easy to draw the line between these two provinces of law and fact, since they at times run into each other; especially in the point of drawing inferences from what is proved as a matter of fact. But the rights of a client may at times depend so essentially upon a proper observance of the respective functions of judge and jury, that it often becomes an imperative duty upon a lawyer to insist upon its being regarded. If a client, from any cause has a better chance at the hands of a jury than the court, no regard for the dignity of the judge, or the respect due to his office, should hinder the counsel from protesting against any interference on the part of the court, with the appropriate functions of the jury.

Nobody can hold the office or character of an intelligent, upright judge in greater respect and veneration than I have been taught to do. The people have no safeguard or protection on which they can so confidently rely for life or property, as upon an enlightened and independent judiciary. But when men talk gravely of substituting the learning and experience of the court for the good sense, practical experience, and unbiassed instincts of an impartial jury, they do violence to history, and injustice to the cause of personal liberty and right. And while I would not let a jury trench a hair's-breadth upon the province of the court, I have no hesitation in saying, that, for trying and settling disputed questions of fact, through the instrumen-

talities of human testimony, where men and their motives are to be weighed and scrutinized, and balances are to be struck between conflicting witnesses, I had rather trust to the verdict of twelve fair-minded men of average shrewdness and intelligence, in a jury-box, than the judgment of any one man trained to the habits of judicial investigation and accustomed to measure his conclusions by the scale and standard of the law. I had rather trust to the honest instincts of a juror, than the learning of a judge. Nor do I believe that, in the history of the courts of New England, there are more instances of mistaken verdicts than of mistaken rulings of law. The most we can expect from either jurors or judge, is an approximation to accuracy in the respective spheres in which they act.

Before coming to the mode of conducting a case before a jury, I ought, perhaps, to say a word of how they are impanelled, and how far it is open to counsel to object to any one found upon the panel, whom, for any cause, he might wish to have set aside. This is, in fact, pretty much all that counsel can do in selecting the jurors who are to pass upon his case. If, for instance, he is prepared to show that a juror has formed or expressed an opinion upon the merits of a cause upon which he is about to be impanelled, or is related to the opposite party, or has hostile feelings or prejudice against his client, it is not only his right and his best policy to object to his serving as such juror, but it is the duty of counsel to insist upon the objection. But such a movement is a hazardous one, if he is not quite sure of being able to

establish the fact of such prejudice or hostility. It creates an antagonism between such juror and his client to be made the subject of open discussion in court as to his fitness or capacity, and, if the attempt fails, it is apt to leave a sense of wounded self-love which it is difficult to overcome in the progress of the trial. So that, in all doubtful cases, it is better to try to win over a suspected juror than alienate him by declaring open hostility to begin with.

I may remark in passing that there are cases occasionally where counsel may desire to have a jury "view," as it is called, or visit the scene or locality of a transaction about which testimony is to be offered when it is necessary, in order to understand and apply it. This is especially the case in the trial of questions of boundary, or where the relation of one object to another may be referred to by witnesses. And it is even allowed, though reluctantly, by the courts in capital cases. It is only upon special application by one or both of the counsel that the court permit and order such a view. And in such cases, an officer is detailed and sworn to take charge of the jury, to prevent their hearing statements from any persons but the counsel named by the court, who, in presence of each other, may point out the objects to which they wish to call the attention of the jurors, to be afterwards referred to in the trial of the cause. I hardly need to say that this is usually done after the jury is impanelled, and the plaintiff has opened his case, and before the witnesses on either side have been examined.

5. The opening of a cause here spoken of deserves more than a passing notice. Upon the manner in which it is done, often depend an impulse and direction which affect the case during its whole trial. It consists, mainly, of an introductory statement of what the court and jury, respectively, will have to inquire into, and of the facts and the law upon which the plaintiff expects to rely for a verdict and judgment in his favor.

Except in very difficult and complicated cases, this ordinarily devolves upon the junior counsel, where two are engaged, and is a pretty severe test of his understanding of his case, and his appreciation of what it demands of him in properly conducting it. The "argument," so called, is usually offered by the senior counsel, and is not made until the evidence on both sides is closed. But important as that may be to a full understanding of the testimony and its bearing in any particular case, the opening is hardly less so, as a means of the jury being able to perceive the bearing of the evidence as it is offered, and of receiving impressions which they are likely to retain. What is chiefly wanted in such an opening is a clear, simple, orderly statement of the facts and circumstances which go to make up the plaintiff's cause, in which there is little room for general argument, and less for rhetorical flourish or fancy. Sometimes it becomes necessary to present, in an opening statement, the law of the case, if there is any thing novel or peculiar in this respect. And, so far as this is concerned, it is to be addressed to the court, with such reasons and arguments why the

rule contended for should be applied, as the counsel may deem proper to urge upon their attention.

There is one caution to be observed in the opening of a cause, and that is to avoid exaggeration or over-statement, in respect to the facts proposed to be proved. It is enough that the jury are apprised what the facts are, and if when the proof is offered it falls short of what they had been given to expect by the opening, it reacts upon the case itself, and creates a distrust in whatever else the counsel has claimed for it. Whereas, if he is careful to keep within what he afterwards proves, it creates a favorable presumption upon any matter which is left doubtful in the trial if confidently stated by the counsel. The importance of the statement of opening counsel, whether in prosecution or defence, being orderly and clear will be obvious, the moment one reflects how little trained the minds of ordinary jurors are to take in and retain any considerable number of facts, the connection and relation of which with each other are not readily apparent, and where in order to do this it requires the patient exercise of memory. To aid them in doing this, they need to have the facts presented to their minds in the natural order of time and sequence, and surrounding circumstances, and to be thus made as nearly palpable to their senses as possible. It serves as a clew by which they can call these up in their deliberations, upon the principle of association. But to do this well requires a counsel to be fully possessed of his case in all its parts and their bearings upon each other. If the counsel is confused at

the start, the jury find themselves in the same dilemma, and the labor of unveiling and explaining its merits in the final argument, is greatly enhanced, if not rendered impossible.

6. What I have said of order in an opening statement, suggests a valuable hint as to the order of introducing the evidence which it is proposed to offer in the trial of an action. Few things test the skill and good sense of a lawyer in the conduct of a cause more severely, than the manner in which he introduces his evidence, and nothing, I may add, shows the superiority of the ability and adroitness of one lawyer over another more palpably, than the examination of witnesses. So far as his own witnesses are concerned, he must, in order to do justice to his cause, know them as well as what they will testify.

7. Some witnesses are able to state clearly and distinctly what they know, because they are accustomed to see and remember what they see distinctly ; while others, equally honest and equally desirous to tell the truth, leave upon the mind of the hearer a cloudy and indistinct impression of what they really mean to say. It carries no force of conviction in the manner in which it is stated. Others, again, have a loose and careless way of telling what they know, using stronger language than the exact truth warrants, and they thus lay themselves open to a damaging cross-examination, which often detracts from the credit which ought to be paid to what they do

say. Another class are timid and constitutionally shrinking and sensitive, who hardly dare to insist positively upon what they do know. To make them of any account, they must be gently led by the counsel who calls them, and are always in danger of breaking down under a sharp and unsympathizing cross-examination.

I have confined myself, thus far, to such as are to be classed with honest witnesses whose credit in the community is not open to impeachment. Then there are witnesses whose habits of coloring and exaggerating whatever they state, get them a bad reputation as to reliability, and still another class who will state an absolute falsehood with so much gravity and apparent sanctity, and are withal so smooth and cautious in their manner of doing it, that it is next to impossible to lay hold of any thing upon cross-examination, by which to show them up, or expose their want of truthfulness.

These are but a sample of the thousand shades of character and capacity of witnesses with whom lawyers, at times, have to do in court. And to know how to discriminate in the management of them, is one of the highest qualities of an advocate. Another class of witnesses has been added to those known to the common law, by legislation, in England and several of the States by rendering parties competent to testify in their own behalf. And in some of the States this most questionable privilege has been extended to persons on trial as criminals.

How far it is wise to call a party as a witness in his own cause, depends upon the circumstances

under which it is done. If it is not done, inasmuch as the party ought to know what the truth is, and he hesitates to tell it, it tends to raise a suspicion that, if it was told, it would make against him. So that the counsel is, in a measure, constrained to call him. And it is only when he happens to know things which will make against him, if called out on cross-examination, that he can greatly hesitate what to do. If such a witness is offered to prove what is not true, it will always be a dangerous experiment, to say nothing of the dishonesty and disgrace of the thing; since there is something in a close, well-conducted cross-examination which not one in a hundred can go through without exposure. I have, time and again, seen a shrewd, collected, and cunning plaintiff who has made an exceedingly plausible statement of the supposed facts on which he sought to recover on his direct examination, so effectually broken down by a cross-examination, as to leave nothing for his case to stand upon. And yet, there are cases where the testimony of a party may become exceedingly important in supplying some connecting link between the testimony of other witnesses, and the main points of the case. But where this is to be done, the ground should be prepared by first introducing the other testimony, and thus doing away with the impression that the party is a mere volunteer witness.

Of one class of testimony which is sometimes offered by counsel in a trial, let me guard and caution you, as I would against any other discreditable act, and that is volunteering yourselves to be wit

nesses in your own cases. An emergency may arise when counsel, in the midst of a trial, finds it essential to establish a fact which he could not have reasonably anticipated, and to which, it happens, he alone can testify. In such case he has no election. But if one knows, beforehand, that he is to take the stand as a witness, a decent self-respect demands of him that he withdraw himself as an advocate, instead of attempting to act in both capacities. Among the scandalous stories that are told at the expense of the profession, is the answer which is said to have been made by one of them, who, when inquired of what his charge would be for managing a case in court, wished to know whether he or the client was to furnish the evidence?

There is still another species of testimony which I ought not, wholly, to omit, although I have no space to do the subject justice, and that is the testimony of experts. It has grown to be common of late years, and is becoming more so. It is held to be competent, although in apparent derogation of the rule which, with few exceptions, excludes witnesses from testifying to mere matters of opinion, and confines them to what they *know* of *facts*. But though such testimony is, in form, the expression of an opinion on the part of the expert, it will be found, when analyzed, to be a mere means or medium by which what is a fact is connected with and made to bear upon the issue which is to be decided by the jury. In one form of such testimony, it serves as a means by which a jury may reach a result by comparison between a fact that is settled and another

which is the one in question. If, for instance, the value of an article is the thing to be determined, one who knows the value of similar articles in market is called upon to testify as to the value of this. It is, at best, but a matter of judgment or opinion on his part, derived from comparing it with another which he has bought or sold or seen sold in market, and therefore knows the price of as a fact.

So in matters of science. It has its laws which are assumed to be invariable, and the man who knows these, knows whether certain phenomena are sure to result from certain scientific causes or a combination of causes; that is, if he had witnessed these phenomena, he would know how they were caused. Thus, suppose a death has occurred. That can be positively sworn to. Suppose it is questionable whether the party died of poison, but nobody knows the fact. Suppose that certain phenomena attended his death, which witnesses were able to state from having seen them. There would be nothing thus far to throw light upon the question of poison. But suppose then a man who had made the subject a study, and had ascertained by observation or otherwise that such phenomena as had been testified of in this case always attended the use of a particular poison, and was not known to follow any other cause, the testimony of this expert becomes the evidence of a fact, which, with the other facts, may establish the principal one beyond a doubt, although his testimony, at best, so far as it related to that particular death, was only a matter of opinion derived from the testimony of others. Given in this way,

and founded upon this basis, the testimony of experts is not only proper for the consideration of a jury, but it is of the highest class of evidence; and justice at times could not be administered without it. But the difficulty it has to encounter is the want of certainty that the witness does *know* that of which he testifies. He is mistaken in what he supposes to be a *law* of science. New discoveries supersede what was once believed, and what seemed to be a law turns out to be a mistaken theory. Dr. Lardner is said to have ascertained by the laws of science, that a steam frigate could not carry coal enough to navigate her across the Atlantic. Upon his premises, this was an established fact. And yet a few years after, the very frigate upon which his experiments had been tried, and his proofs elicited, was lying at a wharf in Montreal, having crossed the Atlantic in spite of science.

But the most serious objection to such evidence grows out of men pretending to be experts when they are not. They have a smattering of knowledge, and profess and believe themselves to be adepts in science, when they have, at best, vague and uncertain notions only upon the subjects which they profess to know. And what is worse even than this, they hear a party state his case; and assuming it to be true, and knowing his object is to get a certain opinion upon these facts, the witness gives to them a partial or one-sided examination, and is generally able to make up a judgment satisfactory both to himself and his employer. And in this way he takes a retainer to supply an opinion as an expert, upon oath,

in the same way as an advocate accepts a retainer to do the best he can, by fair argument, to maintain the opinion which his client is desirous to establish.

In this way it is positively shocking, at times, to see witnesses called as experts, arranged against each other in the trial of a cause, each professing to be an oracle in the department of science which he takes it upon himself to represent, and leaving upon the minds of the jurors grave doubts if any of them are true. The older books, I may add, have very little to say upon the subject of expert testimony. And if the young lawyer can have no other hint to guide him in the application which is to be made of it, he should, first of all, have the fact settled that the witness is an expert, before he allows him to testify against him in the case without interposing a protest against it; and, in the next place, he should expose, if possible, by cross-examination the want of such capacity on the part of the witness. Such witnesses are apt to find fault and complain at being sharply cross-questioned: but the fault or folly is their own; for if they are honest, and do know that of which they are testifying, they will have little occasion to be disturbed by being cross-examined. No cross-examination would have disturbed Isaac Newton in applying the doctrine of gravitation while testifying in court.

8. An important thing to be considered by counsel is the order in which they shall put in their evidence, in respect to which few arbitrary rules can be laid down. Each case must depend, somewhat,

upon its own circumstances, and each lawyer must depend very much upon his own tact and sagacity. And yet there are a few hints which readily suggest themselves in respect to every case. If the action is based upon documentary evidence, like a note, bond, or deed, the first step towards the proof is to produce and verify the paper, or account for its loss or absence, and prove its contents by other means. If the paper declared on has subscribing witnesses, one or all of these must be produced or their absence satisfactorily accounted for, and their handwriting proved. If the necessary paper is in the possession of the adverse party, evidence of its contents cannot be offered until such party has been notified and had an opportunity to produce it in court.

If after this has been done, or in cases which are not based upon written documents, it becomes necessary to call witnesses to establish, by their testimony, the facts upon which the one side or the other is to rely for a verdict, the trial of the counsel, if not of the case, may be assumed to begin. It often taxes his skill and sagacity to their utmost. So much depends for the effect of a case upon the manner in which it is "put in," that great caution and circumspection are requisite on the part of counsel, as to the arrangement of his testimony, and the order in which he calls his witnesses. If he puts forward a timid, hesitating witness, whose statements, though true, are confused or doubtfully expressed, and, after that, his testimony has got to run the gauntlet of a sharp cross-examination, there is an impression likely to be left, upon the minds of

the jury and court, that is all but fatal to the case of the party who calls him. Sometimes it is necessary only to put in enough of a party's evidence to make out a *prima facie* case, and it is often best, in such cases, to keep back the strength of his testimony till that of the adverse party has been heard, and then offer it by way of rebuttal to the case which has been made against him. It makes a more lively impression upon the jurors' minds by coming in after they have been prepared to understand and apply it.

And yet there are cases, where it is desirable to anticipate an adversary's case, and prepare the jury for it. Such is the case where there is any thing suspicious in appearance, which is susceptible of explanation. It is often best to put in the fact and the explanation in advance, and remove all pretence of concealment or artifice, by showing how and why the thing took place as it did, and thus, as it were, draw the adversary's fire. I have seen one counsel disarm another altogether, by getting the first chance to tell a story. And where the plaintiff's case is such as to require explanation, it is, to say the least, generally better for him to make it in his own way to begin with, than to leave it till he is driven to make it by something that has come out on the other side.

What would seem to be a natural order in calling one's witnesses is to put forward some one of them who knows an important fact, and is sufficiently intelligent and self-possessed to be able to state what he has to say in a clear and deliberate manner, and

will not be likely to be embarrassed or disconcerted by a cross-examination. Another reason for adopting this course is, that the sharpest attempt at cross-examination is usually made upon the witness that leads off in the examination, and if he sustains himself well through it, it breaks the force of the subsequent attacks upon the witnesses who follow him, as it becomes less and less important to break them down. Another thing to be observed is, if one has several witnesses to the same subject-matter, let him call them immediately in connection with each other, so as to prevent the attention of the jury from being distracted by the introduction of new subjects between the parts of what are properly related to each other. Let the witnesses, in other words, in this way sustain and strengthen each other.

9. Great caution, moreover, is to be observed in dealing with one's own witnesses on the stand. With some it is safe to simply ask them to state what they know upon this or that subject upon which they are called to testify. With others less intelligent or less self-possessed, it becomes necessary to proceed more slowly and cautiously, step by step, and question by question, and be sure that they understand the inquiry before they are allowed to answer. The effort, moreover, should be to put the witness at his ease, which may often be done by an incidental question or two before the more important ones are broached. And, where one is sure of his witness, it is often good policy to content himself with an imperfect examination, leaving the rest to

be supplied in answer to such questions as an earnest and sharp cross-examination would be quite sure to draw out. Your antagonist in so doing, helps you by, as it were, putting in his own testimony in your favor.

But there is, after all, a certain tact and knowledge of men requisite in the management and examination of witnesses, which cannot be supplied by any *a priori* rules, and seem to come from the intuition of genius.

LECTURE VII.

PRACTICE. — *Continued.*

- 1 Examining Witnesses. — 2. Doctrine of Set-off. — 3. Rules of Evidence. — 4. Cross-examination of Witnesses. — 5. Minutes of Testimony.

1. If we pursue this subject of how to examine witnesses further, we shall find that much that seems to be intuitive in the skill which some display, is the direct and legitimate result of study and observation, in which common sense is worth a great deal more than the learning of the books. To see it skillfully applied by others is an excellent lesson for the learner. But to do it himself is a far better one, if he will but study and watch at the same time the laws and phases of the human mind, and the principles of human action which he may thereby see brought into exercise. One thing may and ought to be remembered by counsel when examining a witness, and that is, to have some definite aim and purpose in every question he puts to him; and if he has a line of inquiry marked out, not to suffer himself to be diverted from it to side issues, as an adroit adversary may often do with him, if he is not clear in the course he is to follow. Unless he does so, the jury are liable to get confused as to what they really are to settle, and to lose the force of

much that they hear. So, if to a question you have propounded you get a clear and intelligible answer, you had better stand by it, and pass on, than by trying to make it plainer you should repeat your question, at the risk of your answer coming the second time in a qualified or diluted form, and mixed up with something that you do not want. The only exception to this that I think of, is, where it is desirable to fix some distinct and important fact, such as a sum, a date, or the specific terms of an agreement and the like, which you will have occasion to make use of afterwards in the trial.

The only modification which it would seem necessary to make in respect to the examination of witnesses called in defence of an action, from what I have said of the order in which they should be put upon the stand, results from a kind of necessity there is at times, of conforming in this to the course which the cause of the plaintiff may have taken. It is obviously proper so to arrange the testimony in defence as to have the jury see and apply it to the points of the plaintiff's case which it is intended to meet and rebut.

It is sometimes attempted to break down the force and effect of the testimony of a witness who has been examined upon the opposite side, by showing that he is not to be credited by reason of his general bad reputation in the matter of truth. The ground upon which such impeachment is allowed is, not to show that the witness has testified falsely, but that he is so reckless of truth in his ordinary mode of stating and telling things that

those who know his habits in this respect do not rely upon his word. The idea is, that one who is thus careless and indifferent as to truth in the common affairs of life has either become so perverse in the habit of telling what is false, or so obtuse in distinguishing truth from falsehood, that he cannot be relied on even when making his statements under oath. The only way of impeaching a witness, on such a ground, is by calling other witnesses who know him, and can testify that he has a general reputation where he is known, in respect to telling the truth, which is bad. But there are practical difficulties in the way of this kind of evidence, which ought to be considered before attempting to make use of it. In the first place, the witnesses who are called for the purpose are so apt to confound reputation with facts, as to be unable to discriminate between a knowledge they may have that a certain person on some occasion told a lie, and therefore is not to be believed, and the general opinion entertained in respect to his disposition to falsify from his well-known habits in this respect. So that if a witness is called and testifies that the witness in question has a bad character for truth, it more frequently than otherwise turns out, upon cross-examination, that it is *his* opinion, not that of the public, and is derived from some personal prejudice or quarrel. No one scarcely who has ever undertaken to break down the testimony of a witness by calling other witnesses to his reputation, has failed to experience the embarrassment I have spoken of. And then, where the attempt has been made, and one set

of witnesses have testified against him, another set, consisting of his friends, can generally be produced to bolster up his reputation, till the jury are more than half inclined to doubt which is most effectually impeached, — the witness, or those who are called in to destroy his credulity.

All this might be of little consequence beyond the time it consumes, if, after the experiment had been made, the impeaching party stood as well as he did before. But such is not the case. In the first place, by making the effort, he gives a consequence and importance to the witness and his testimony which they often do not deserve; and, if he fails to destroy their credit, he actually gives them a fresh credit by impliedly admitting they are entitled to consideration unless he can show the contrary. When such attempt, moreover, is made and fails, it excites a feeling of sympathy in the minds of a jury in favor of the one who has been thus attacked. No one should make the attempt unless he is sure that his own witnesses understand to what they are to testify, and are prepared to sustain themselves under the cross-examination which is sure to follow.

There is a dilemma in which counsel sometimes find themselves, in the midst of a trial, by the failure of a witness to come up to what he had previously stated, when inquired of in a preliminary consultation. This may arise from treachery on the part of the witness, or from confusion, or forgetfulness, or fear of cross-examination. But whatever may be the cause, it puts the counsel in a most embarrassing situation. He cannot come out openly

and impeach his own witness by showing that he is not a man to be credited, and if, after every fair effort, without showing indignation or surprise, he fails to draw out the desired answer, all the counsel can do is to seem to treat it as of no particular consequence, and pass it over unnoticed.

If, however, the witness is one whom he is obliged to call, by reason of being a subscribing witness to some paper which he has to authenticate, and his feelings and interests are against the party who calls him, a much sharper course of examination may be adopted, and the interest or hostility of the witness, if necessary, be made to appear. And there are exceptional cases, where the court will allow a party who has been misled by a witness, in respect to what he is willing to testify, to show the surprise, and that the witness has been brought under the influence of the adverse party, and has deceived the one who calls him.¹

If we regard the evidence in defence as standing upon somewhat different ground from that of the plaintiff or prosecutor, it must grow out of the circumstance that, in most cases, it is in the way of rebuttal or explanation of what has already been offered, and it is therefore important to make it clear to the jury how it applies to what has gone before. For this reason, the counsel, in opening the defence, often reviews the plaintiff's case, points out wherein his evidence is defective or fails to come up to what he had promised in his opening, and then goes on to explain how it is proposed to negative and

¹ 1 Greenl. Ev. § 444.

rebut the evidence of the plaintiff; and, in this way, he prepares the mind of the jury to receive what the defendant shall offer to aid them in coming to a correct conclusion.

But in doing this, the same rule is to be observed as in the case of the plaintiff, not to exaggerate or overstate what he expects to establish by the proofs he proposes to offer, lest a failure to accomplish all he promises may react upon himself in the end.

2. Sometimes an action takes a double form so far, that the plaintiff, before it gets through, becomes a defendant, and the original defendant a plaintiff. It occurs in this way. If A. sues B. in an action of assumpsit or contract, and B. has a claim against A. for goods sold, money lent, and the like, he has two modes of proceeding to collect or enforce this claim. He may sue A. in an independent action, and let the actions go on in court together; and when he gets judgment may apply to the court and have his judgment against A. and A.'s judgment against him set off against each other, and an execution issued for the balance only. Or, instead of suing his claim, he may file it in *set-off* against A.'s claim in his suit, and then both go on together. A. would go through with the evidence to support his claim, and B. would go through with his defence as if it were a distinct matter, and then B. would take up his case and go through it as plaintiff, and A. would do the same with his defence, and the jury would finally render a verdict for the one or the other as the balance might be found to be, taking

both claims into consideration. I have mentioned this case of set-off, partly as a point of practice, and partly to remark that each party observes the same rules as to the introduction of evidence as if they were respectively plaintiff or defendant in a separate and distinct action.

3. Some of the rules to be observed in the examination of witnesses, upon which courts insist, may be mentioned in this connection, for the reason that a young man, in the earnestness with which he engages in it, is sometimes led to forget them. One of these is, that counsel may not put leading questions to his own witness. By leading questions is meant questions put in such a form as to indicate the answer that is desired. But though the rule forbidding this to be done is an imperative one, it is not always easy to discriminate between questions which do and such as do not come within the category of being leading. It is always proper to indicate to a witness the subject-matter upon which he is to testify; and he may often be reminded of the person or event about which he is desired to answer, by collateral and sometimes leading questions; but the counsel would still be precluded from propounding the principal question in a leading form. Instead of asking, suggestively, "did you not see so and so?" or "did you not forbid him?" or "give him this or that thing?" the form often adopted is, "state whether you saw, or forbade, or gave," &c., without indicating how the witness is expected to answer.

But this is limited to the direct examination of one's own witness, and does not apply to cross-examination. And it is sometimes allowed to a party to cross-examine his own witness, that is, to put leading questions to him, by permission of the court, where it is clear that the witness stands to him in a hostile attitude or relation, by reason of interest, especially where the party has been obliged, for any reason, to call him.

There is a mode of examining witnesses sometimes resorted to, but which violates a well-settled rule of law, where the counsel in putting a question assumes the existence of what has not, in fact, been proved or admitted to be true. The examining counsel has no right to assume any fact which has not been first proved or admitted. And yet, in examining an expert, it is often necessary to put questions hypothetically by asking, if such and such facts were true, what would be the effect? or, assuming certain phenomena to have been witnessed, what would be the cause of them? In such cases, the jury, before they can apply the answer of the witness, will have to settle, from other evidence, whether the facts or phenomena thus assumed did or did not occur.

Another rule, which I have already noticed, forbids a man who has called a witness, to impeach his general reputation: by calling him he indorses his credibility, and may not gainsay it, except in the few cases to which I have already referred. But this does not prevent his contradicting any particular fact of which his witness may have testified, by

calling other witnesses to the same fact and showing what the truth is.

These are some of the various rules which may be found in written treatises upon the subject. But though these writers may dignify them by calling them "golden rules," it has seemed to me that the young lawyer rather needed hints and cautions as to what he should avoid, than a fuller set of *a priori* rules to be carried in his mind with any expectation of turning them readily to account, to meet the shifting phases which cases assume at times during the course of a trial. What is far better than these is a quick and ready sagacity, which has been trained by observation and experience, and is capable of adapting itself to states of things which no treatise can be sure to have anticipated, nor any set of rules provided for. Especially is this true in the cross-examination of witnesses.

4. This subject of cross-examination is of sufficient importance to call for something more than a passing remark. Its rules, so far as it has any, seem to be indifferently understood by many of the profession. From the beginning to the end of a trial, every thing with them seems to go at cross-purposes. Questions are objected to, answers are interrupted or sharply criticised, and points are suddenly taken upon one side or the other, and urged with zeal and vehemence, one-half of which, when examined, prove to have no foundation, often to the annoyance or disgust of the jury, and at the expense of the dignity of the court as well as of counsel. These things

cannot wholly be avoided, since they often arise from that keen interest which a lawyer naturally takes in the cause he is advocating, and the anxiety he necessarily feels to prevent the introduction of any improper or incompetent evidence by his opposing counsel. This leads to an equal earnestness on the part of his opponent to press, upon his side, whatever may favor his cause; and, in this way, sharp controversies and collisions occur between counsel in the trial of a cause which could be easily avoided, the rights of their clients carefully guarded, and every thing rendered smooth and easy, if they would raise their points and objections in a more systematic and orderly manner. If when a question is propounded by one, the other asks the witness to suspend his reply, and refers it to the court to decide if the inquiry is a competent one, it gives both counsel a chance to be heard upon it, and an opportunity for the party against whom the point is ruled to except to it, if he thinks proper, in an intelligible form.

Great allowance is to be made for the earnestness of counsel; but if they would reflect how much more effectual is the calm and dispassionate manner of one who is self-possessed, than the passionate excitement with which one repels a matter as a personal wrong, they would keep a careful watch over their feelings while engaged in a trial, and be especially careful not to betray an undue sensitiveness during the cross-examination of a witness. I am the more inclined to indulge in these remarks from so often having seen counsel, while conducting a cross-exam-

ination, attack the witness as if they had a personal quarrel with him, and were dealing with some one who was trying to cheat and deceive them.

This is as unwise as it is in violation of good taste. The jury have none of these feelings, and their sympathies are moved in favor of the witness whom they see attacked without any good cause. Others, in cross-examining a witness, go through what amounts, in effect, to a re-examination, putting the same questions in substance, though in a different form and tone, which he has once answered, and generally succeeding in obtaining a more positive statement than the first one, and fixing it more strongly than before in the minds of the jury. They had better, a thousand times, leave their adversary's testimony where he left it than corroborate it by such a cross-examination.

And yet, a discreet, well-conducted cross-examination is one of the surest and most infallible tests of the truth of what a witness has testified that human ingenuity has devised. To do it with force and effect, the counsel should study and understand his man, should take a measure of his quickness and capacity, and mark his temper and disposition, and settle in his own mind whether the witness comes to tell what he knows, or to do what he can to aid the side he is called to support. In the next place, he will so conduct himself as not to create a feeling of antagonism between him and the witness; unless he is willing to have the witness understand that he believes him false, and intends, if possible, to break down his testimony. But the first thing, after all,

for the counsel to settle is whether the testimony of the witness is important enough to cross-examine him at all. If he cannot, by such cross-examination, contradict or explain something which bears upon the issue to be tried, the sooner he gets rid of him the better ; and he should never, if it can be avoided, give him a chance to repeat his story, or supply what he may have omitted in his direct examination. If his statement has been material or important, the counsel are to look over the ground with care and see whether it is probably true. If it is, nothing can be gained by having it repeated. If he believes it is untrue, the counsel is to consider whether the witness is mistaken or means to testify falsely. If the former, it is always bad policy to attack the statements in such a way as to compel him out of pride and self-love to withhold an admission that he had been mistaken, which he might often be willing to make, if approached in a different manner. But the severest test of skill in cross-examination is in the case of a witness whose feelings and interests are with the party who calls him, who mixes with what is true enough that is otherwise to color and disguise it, and give it the desired effect, and does it in such a manner as to keep within the bounds of probability, and give an apparent consistency to the facts of his story. If to this is added a cool and plausible manner, it is no easy task to dissect and lay open what is false, to the minds of a jury.

But it has been done too often to pronounce it impossible to do it always. The skill is in breaking up and deranging the facts of the witness's story, till

he loses his clew, and begins to falter or contradict himself. And this is often done by some side blow, some unexpected and unlooked-for inquiry. And when it is done, it acts not only upon the witness, but upon the case of the party who calls him. Few advocates in New England surpassed the able and distinguished Jeremiah Mason, in the cross-examination of witnesses. And among the anecdotes which are told of his skill and success is one of a most respectable looking Quaker gentleman, who told his story with great simplicity and self-possession, carrying conviction to the mind of every one who heard it. Mr. Mason, who was instructed that his testimony was false, attempted to shake it by cross-examination; but he found the witness too cool to contradict himself, when suddenly changing the topic of inquiry he looked sharply at his Quaker garb, and asked the witness where he got the coat which he had on? In his hesitancy and embarrassment in answering the question, the counsel saw at once that there was something wrong about it; and, following up the inquiry, before the witness had time to recover, he extorted from him at last that it had been furnished him for the occasion, that he was not a Quaker, and ended in showing him a cheat. But to cross-examine a witness with effect, the counsel should follow up his interrogations with sufficient rapidity to prevent his retrieving himself, if forced out of the train of his narrative which he had previously prepared, without stopping, as is often done, between his answer and the succeeding question to write down what has been said.

The result of a cross-examination, if at all effective, naturally excites a desire on the part of the counsel who called the witness to come to his rescue. This is sometimes done by objecting to the questions proposed, and sometimes by complaining and finding fault as to the mode of conducting the examination. And, if this is well founded, it often gives a chance to the witness to sustain himself by explanation or correction, if need be. But any such course, unless well grounded, is unwise, inasmuch as it shows a restlessness and apprehension on the part of the counsel, which often amount to a kind of confession that his adversary is damaging his witness, and that he must come to the rescue.

While it is true, as I have said, that this process of cross-examination is a most powerful and effective means of exposing falsehood, where it is skilfully conducted, it is a dangerous experiment in the hands of one who does not know how to use it. More cases are injured than benefited by it, especially if it extends beyond correcting unintentional mistakes, and supplying explanations, when they are needed. And, if attempted with a view of breaking down the general credit of a witness, it more often than otherwise fails, because the instances of deliberate perjury are comparatively rare; and even so strong a disposition to color and exaggerate as to essentially impair the credit of a witness, is so difficult to show by his own testimony that the attempt is rarely successful. Mr. Ram alludes to the extreme caution with which Eldon, while at the bar and a counsel, ventured upon the cross-examination of adverse wit-

nesses.¹ And I may venture another quotation from an address to which I have before referred.² "I believe that more causes are lost by unskilful examination of witnesses than from all other species of malpractice combined. Always know what your witness is called to prove ; direct his mind to that particular object ; get through with him as quickly as possible. In cross-examination of witnesses, if I were to lay down one and an invariable rule, it would be not to cross-examine at all. In nine cases out of ten, where a witness testifies against you, your cross-examination will make a bad matter worse. If you believe a witness is honest, and only mistaken, treat him courteously ; never touch his pride, nor put him on the defensive. If you believe he is swearing falsely, go down upon him like an avalanche."

There is an experience sometimes met with in attempting to cross-examine a witness, which illustrates the hazard of attempting it. I have already stated the rule which excludes leading questions in the direct examination ; and there may be other difficulties in the way of drawing out of a witness all he is ready and willing to tell by direct inquiries on the part of the one who calls him. Whereas, if the answers he does make can only lead the opposing counsel to go into a further inquiry in the way of cross-examination, it often opens the very opportunity which the party calling him desired, and the witness is willing to avail himself of, to bring out the facts and the testimony which otherwise would have remained untold.

¹ Ram on Facts, 138.

² Mr. Carpenter.

There is one rule, let me add, which one ought to observe in cross-examining witnesses, both as a lawyer and a gentleman, and that is never to avail one's self of his position as counsel and an officer of the court, to badger and browbeat a witness, as some lawyers do, as if he had been guilty of a positive crime in obeying the summons of the court, and testifying in the case in which he is called. Such a course can hardly fail to react upon the party who indulges in it, as it awakens a sympathy at once in the minds of the jury in favor of the, to them, innocent object of it.

I might add, that a cross-examination often leads to a re-examination of a witness by the party who calls him. But as there are few special rules applicable to the process, I only allude to it in passing. But there are one or two additional suggestions of a general character which I ought to make before leaving the subject. One of these is the importance to a lawyer of having an exact and familiar knowledge of the rules of evidence clearly fixed in his mind, and, as it were, at his tongue's end. In the hurry of a trial he has to act at the moment, and generally without opportunity of referring to his books. If he makes a mistake by omitting to object to evidence when it is offered, it is too late to do it afterwards. For this reason, from a consciousness of wanting this exact knowledge, and a fear that they may waive rights which they ought not to do, it becomes exceedingly annoying to try cases against some counsel in consequence of their constantly interposing objections to questions put by the opposite

counsel to his witnesses. This has been often done where the counsel, when called upon by the court to state the grounds of his objection, has found he had none to stand on. The consequence of such a course is, that the case goes on in a perpetual wrangle, and is constantly calling for the interposition of the court.

Aside from the unpleasantness of the thing, it is bad policy on the part of the one who makes a frivolous objection, in the effect it has upon the minds of the jury in giving them an idea of the importance of the inquiry which is often altogether factitious, and creating an impression that the party is fearful and suspicious of the strength of his own case. Aside from sacrificing the dignity and respect which are associated with courts of justice, every thing which a party desires to accomplish can be so much better reached in some such manner as I have before indicated, by appealing directly to the court in doubtful or objectionable matters, that counsel who indulge in the practices which I have mentioned do a positive injury to their own cause.

5. One thing connected with the examination of witnesses I ought briefly to notice, and that is the taking and keeping notes of the testimony as given. This is important on several accounts. It is very often desirable to preserve the statements, and often the very language of witnesses, for use after the particular trial in which these were made has closed ; as, in drawing up exceptions to the rulings of the judge in motions for a new trial, or in a retrial of

the case. Some counsel depend upon the accuracy of their memories, without taking the trouble of keeping minutes. But if the evidence is complicated or protracted, and calls for a comparison of one part with another, such a course, for most minds, is unsafe and unreliable.

In the first place, the jury keep no minutes, and are often obliged to rely upon the recollection and minutes of the court and counsel. In the next place, counsel are very apt to disagree as to what the witness did testify, in which case recourse must be had to the minutes of the court, or, as a last resort, to fall back upon the imperfect recollection of the jurors. Nor is it always safe to rely upon the minutes of the judge. These, of course, must be imperfect; and where, as is sometimes the case, the judge takes a lurch in favor of one side or the other, he is pretty apt to give special prominence to such parts of the evidence as favor his views. Either the counsel or some one in his behalf should therefore take careful minutes of the testimony on both sides of the case; and not only of the testimony, but of the various rulings of the judge upon matters of law during the trial, and of his instructions upon the law of the case to the jury in giving them a final charge which are to be preserved for subsequent reference.

It is partly to familiarize yourselves to doing this with facility, that you have been advised, from time to time, to take notes of what you hear in the lecture and recitation room. But as it would not be desirable, if possible, to note down all that every

witness says, it requires a good degree of discretion, founded upon experience and good sense, to discriminate what to preserve and what to omit. It is especially important, as far as possible, to take down the precise words of the witness, instead of undertaking to give the sense and meaning of what he says. And where they relate to some special act, like a tender made or the terms of a contract, or words spoken on which the action is based, it is always advisable to read them over to the witness, as taken down, that there may be no cavil or dispute in respect to the matter afterwards.

There are various methods resorted to by those who desire to prepare themselves to take such minutes as I have been speaking of; such as *stenography*, *phonography*, and the like. But most lawyers find it easier to jot down what they want to preserve in their own way, than to follow any artificial mode which has not become, by its use, an almost instinctive act of the will, like giving the sound of a familiar word in reading, or spelling it in writing. Whoever saw Mr. Choate take notes of testimony would understand the possibility of doing it by the use of signs and symbols which were independent of all laws of phonography.

With all that I have said of the examination of witnesses, it has been no part of my purpose to treat of the law of evidence as it is generally understood. Nor do I propose to do so now, beyond a single suggestion connected with preparing the way for the introduction of the evidence which a party may intend to offer. Formerly it was very common to

raise a question of *competency* where a witness was offered, on account of some assumed or supposed interest he had in the matter. That often required him to go through the process of *voir dire* or requiring him to answer, upon oath, whether he had an interest in the subject-matter in controversy. But the objection of interest having been removed by statute in England and several of the States, there is no occasion to dwell upon this matter.

But there is often a preliminary measure requisite to the introduction of evidence, arising from an imperative rule of law that secondary evidence is never admissible to establish a fact, when it is clear that proof of a higher kind may be had. If, therefore, one has occasion to make use of a deed, or written contract, or published matter, upon a trial, and cannot produce the original, because it is lost or destroyed, or is in the custody of the adverse party, he must first make proof of such loss; or, if it is in the custody of the adverse party, must show that he had given that party due notice to produce it. When this has been shown, to the satisfaction of the judge, the party may show the contents of such paper by secondary evidence, such as the testimony of witnesses who have read it, and the like. And the loss or destruction of a paper may ordinarily be shown by the testimony or affidavit of the party himself, who is assumed to have the charge or custody of it.

LECTURE VIII.

PRACTICE. — *Continued.*

1. Separate Examination of Witnesses. — 2. Argument of Questions of Fact. — 3. Circumstantial Evidence. — 4. Collateral Issues. — 5. Reciting Testimony of Witnesses. — 6. Deportment of Counsel. — 7. Instructions to Jury.

1. Counsel may, at times, have reason to believe that the witnesses upon the opposite side have combined to sustain each other in the testimony they shall give, and that it is important that they should be separately examined to defeat this scheme. This is especially true where a number of experts are called to establish or sustain some theory or pretended law of science. And if the court are satisfied that the counsel, acting in good faith, believe the rights of their client require this to be done, they will ordinarily comply with the suggestion without further proof, and pass an order that the witnesses should withdraw from the court-room until successively called in to testify.

2. It may be thought that I have occupied your attention, unnecessarily, with matters which are preliminary to what some are disposed to regard the highest duty and the most appropriate field for the exercise of legal talent, — the argument of questions

before a jury. But the experience of a lawyer soon tells him that these preliminary matters are often quite as important to understand, as how to "argue the case." He learns that he has the law to deal with, as well as the testimony, even in settling an issue of fact. If the law excludes certain of the testimony on which he has relied to sustain his part of the case, or if, upon his own theory or showing, the law is adverse to maintaining his action or defence, it becomes exceedingly important for him to be apprised of it before his argument is begun, lest he may be arrested in the midst of it by being told that the point he would establish is not open to him, or that the law has been settled against him.

This often renders it necessary to apply to the court, before beginning an argument, to make a ruling as to the law of the case by which the counsel are to be governed, and what the questions are which are open to him for argument. Such rulings, however erroneous they may be shown to be upon an ultimate hearing upon exceptions, which the party dissatisfied with them may make, are to be regarded as the law of the case for that trial. Nor can counsel who have respect for themselves or the profession to which they belong, attempt to evade the effect of such ruling, by asking the jury to revise or disregard it, in order to reach some fancied equity of the case. Such a thing is sometimes attempted; but counsel generally gain but little by such appeal, if the judge who tries the case is fit for the place he holds. If he knows what belongs to the proper province of the court, he will never allow an appeal

to be made from his decision to that of the jury. Generally it is only necessary to appeal to the self-respect of the counsel, as is mentioned in the Law Reporter¹ to check any disposition to break over the proper line which separates the province of the court from that of the jury.

So whatever points of law the counsel, on either side, propose to make in the course of the argument, as being material to the decision of the issues involved in the case, should properly be presented to the court, before the general argument upon the merits is begun, that the judge may be prepared, on his part, to give proper instructions upon the subject, and the adverse counsel may be apprised of what he is to meet.

If now we assume, that all these preparatory steps have been taken, we may also assume, for the purposes of following out our inquiries, that the case is in readiness for the closing argument of the counsel. And upon this, it is hardly necessary to remind you, that it is ordinarily deemed a decided advantage to have the "last word," or concluding argument to the jury. It gives counsel a chance to answer his adversary, as well as to put forward his own argument, without any chance, on the other side, to reply. - While special pleading was in force, it was often a sharp game of skill so to shape the issue as to give the right of close. But where, as is now the case generally, the trial proceeds upon what answers to the general issue, as a denial by the defendant of the plaintiff's right to recover, the close falls to the

¹ 8th, 384.

plaintiff. And this, as a general thing, applies even in criminal trials, although in some of the States the privilege of the close is secured, by statute, to the prisoner.

I shall make no attempt to lay down rules as to the form or parts of the argument which a counsel may or ought to address to a jury. Nor even the style in which it should be done. There are numerous treatises upon these subjects by masters of the art, from the days of Quintilian or Cicero to our own day, which may be studied to advantage, while it would be preposterous to attempt to do any thing of the kind within the little space to which I am limited. And yet, if I were to omit the subject altogether, it might seem as if I had ignored the most important part of a lawyer's function. There is such a universal recognition of the power of true eloquence, and there have been so many occasions where it has fallen to the fortunate lot of an advocate in a court of justice, to signalize himself by the exhibition of this power, that the ability to speak well and eloquently has come to be associated, in some minds, with the idea of eminence and success in the profession.

Though I am not insensible to the power of eloquence, and can hardly conceive of any thing more worthy of the highest ambition of a great mind, than the triumphs which such advocates as Pinckney and Webster won at the bar, I feel bound to protest against making their achievements the standard by which to judge of what ordinary average minds of able and intelligent men should be expected to do,

or what should be demanded of the profession as jurists, as advocates, or as useful and honorable functionaries of the law. Eloquence is a relative term. Eloquent words, and the manner by which the popular orator moves an assembly, are simply ridiculous when ill-timed and misapplied. To indulge in pathos before a jury, while trying to persuade them that one of two monuments is the true boundary which they have got to settle, or an impassioned appeal of rhetoric in fixing the value of a bale of goods, or whether the defendant has broken his warranty in the quality of a horse, would raise a smile rather than carry a verdict.

True excellence in a forensic argument consists in skilfully using and applying such materials as one has to deal with, and in a manner suited to the circumstances under which they come before the court and jury. The very subject itself often suggests the style and tone with which this is to be done. But though it cannot be denied there is a fascination of manner, which some men seem to have from nature, by which they are able to reach and control the attention and will of others, there is nothing in the fact which should deter any one from aiming, by the faithful culture of such powers as he has, to be able to convince the judgments and influence the wills of others by reason, persuasion, and the conviction of truth. I believe in genius, but I believe far more in labor; and where one man succeeds by his genius, a hundred make their way to success by hard work. And while, here and there, one may be found who can reach the stature of a

great orator, as well as able advocate, there are very few who cannot, if they will make the effort, become in time useful, able, and effective speakers and advocates.

The complaint of many young men is that they want command of language. When they rise to speak they cannot find words in which to express themselves, and they fairly envy what are called fluent speakers. Such men, half the time, do injustice to themselves from mistaking what they ought to aim at. They forget that the way to reach the reason and judgment of other men, is by thoughts rather than words. Nothing is more vapid and tiresome than to listen to a fluent man, who has a large stock of words, but a slender supply of ideas. If a young man has studied and thought out a subject, so as to have a clear and definite idea of it, he has been obliged, unconsciously it may be, to use words in this process of thinking to himself. And if he would be content to use the same words in expressing his thoughts to others, that he has been making use of to himself, he never need be at a loss for language.

The difficulty, I apprehend, with one who has thoughts, and finds himself embarrassed when he undertakes to address himself to others, is, that he aims to address them in a more graceful and attractive form than the plain every-day language in which he first possessed himself of the substance of what he desires to say. And in this way, he loses his logic in his endeavor to deck it out in the borrowed garb of rhetoric ; and, in failing to make progress,

illustrates the homely adage of the consequence of undertaking to ride two unmatched steeds at the same time.

I apprehend the true secret of success in an extempore speaker is to forget himself, and to let his subject lead him and prompt him, and speak through him. No mother ever found it necessary to frame a set of words when pleading for a son, no matter in whose presence it was to be done. Nor did Jeanie Deans hesitate for words when addressing the Queen in behalf of her erring sister, because of her outlandish speech. When the heart is stirred, and the brain is on fire, the tongue never lacks words. They come as the subject needs them. But the instances where an effort at eloquence or fine oratory is called for, in the course of one's professional business, are so rare and infrequent that ability in this direction should be regarded as no fair test of the probability of a young man's succeeding in life. The way to look at the question is in a much simpler and more common-sense form, and to apply to the business of addressing a jury the same rule as one does in talking to another. If he knows what he is talking about, he is rarely at a loss what to say. This is seen almost every term of a court at which an intelligent woman is called as witness. No matter how modest, or how little accustomed to speaking before others, the habit of a woman's mind, as a general thing, is to see things clearly, and the impressions she receives are usually of sufficient distinctness to enable her to recall and state them clearly ; and, as she has no object in attempting to

make a display, she presents whatever she has to tell just as it stands in her mind, and thereby women make the very best of witnesses.

For a lawyer to do this, in addressing a jury, requires of course a thorough and minute acquaintance with his case. And here is another reason why he is obliged, at times, to master specialties of science, — to be physician, engineer, chemist, sailor, and mechanic, as well as to know the laws of thought and the phenomena of the human mind. If, then, he will content himself with telling what he knows and thinks, in his own way and in the words which first come to him, he need not trouble himself about his rhetoric ; and, as for eloquence, the most effective kind he can make use of is that of plain, homely, good sense which others can understand and feel. Any one may see this, if he will stop and think what the object of a lawyer ought to be, and is, if he is true to his purpose. He wants a verdict for his client, and he has to get it, if at all, by convincing twelve fair-minded men of average intelligence and understanding. And he is to do this by satisfying their minds that certain facts are true, and certain deductions and conclusions should follow. In doing this, he has to deal with their memory, their reason, and their sense of right; but rarely, with their passion or their fancy. And whatever aids them in coming to a conclusion, they listen to with interest and attention, and care comparatively little whether it is said in one style or another. Least of all do they want to hear a highfalutin, spread-eagle harangue, which neither advances a

new truth, nor enforces an old one. And let me assure you that when you come to the bar, the men you will find the most difficult to encounter, will not be your showy, graceful speakers, who count so much upon the ease and volubility with which they address a jury, but your plain, unpretending, and, it may be, awkward reasoners, who come into court prepared at every point, and ready, at the moment, to avail themselves of your weak points or some omission or oversight on your part.

The men of the first class are very apt to leave to others the preparation of their cases, while the second are careful to do that for themselves. And let me add, if you will begin with studying your case rather than what you are to say, and argue it by telling the jury what you know and what you wish them to know about it, and will adhere to this course, you will be surprised to find how rapidly you will gain ease in doing it, and how soon you will find yourselves in the command of appropriate language, in which to clothe your thoughts, rising at times to eloquence.

But I fear I have allowed myself to be diverted too long by these remarks from what is far more important,—the form and substance of the argument you are to address to the jury when the evidence upon both sides shall have been closed. To this end, although it may not always be in your power to do so, it is desirable to prepare and arrange the points you intend to press in your argument in the form of a brief. This is especially so for a young man, until he shall have acquired sufficient self-possession,

and a facility in arranging the parts of his address in an orderly sequence. Unless this is done, there is danger, in the multiplicity of the thoughts and illustrations which will crowd into his mind, as well as the facts he is to remember, and the caution he is to exercise not to leave any point open to his adversary, that many things may escape the recollection of the advocate, which might occur to him in a cooler and less excited state of mind. Such a brief, moreover, may serve as a rallying point for the thoughts of the advocate, by which he can regain his line of argument, if, from any cause, he loses his presence of mind or becomes confused in the orderly arrangement of his topics.

But even here, caution is to be observed not to make the brief too full and minute. It should be an outline, at the farthest, suggestive of topics and their arrangement. Occasionally a would-be orator, while thinking over what he is to say, gets warm in his subject, and hits upon a certain eloquent train of thought, and perhaps some form of expression which strikes him as particularly happy, and writes it down on his brief. But when he comes to use it, he does not always find it easy to bring himself into the same vein as when he made his brief; and if he brings in his preconceived period at all, he has to force it, and it becomes somewhat like an exhibition of spontaneous wit, for which a man depends upon rather a poor memory. If one desires to use figures and embellishments to set off a speech or an argument, he must depend upon the inspiration of the moment, unless he is willing to devote the labor

of preparing it beforehand and committing it to memory.

An important consideration to be kept in mind when addressing a jury is to measure and judge of the men who compose it, their capacity, temperament, and habits of mind, and to adapt, as far as possible, what one has to say, to the judgment of such men. It is worse than time lost to aim one's language or illustrations above the comprehension of those he is addressing. It is, in familiar phrase, shooting over the heads of the jury. They are the instruments which the law furnishes, by which the problems before the court are to be solved, and the lawyer must work with these or not at all. What he has to do is to explain every thing which is complicated or difficult to get hold of on their part, and to remember that they look to him to help them to understand the matters before them. For this, they need to have the evidence analyzed, to be shown how it is to be applied, and how it bears upon the decision which they are to form. And the more fully and completely an advocate does this, the stronger is the hold he gets upon the attention and confidence of the jury. There are, it is true, different degrees of success in attempting to win upon the favorable attention of juries among men of acknowledged learning and ability. Some men are able to make even a detail of dry facts so clear and intelligible, and in such apt and simple language, as to give positive pleasure to listen to it. Much often depends upon the voice and emphasis and action of the speaker. But I apprehend the highest quality of a

forensic argument is its clearness, — clearness in apprehension, and clearness in statement. It was often said that Mr. Webster's statement of a case was better than another man's argument of it. And yet no one ever heard him without being struck with the simple and distinct manner in which he stated his propositions. He had the subject distinctly and orderly in his mind, and put it in such pure Saxon English, without going out of his way for illustration or ornament, that every man who heard him seemed to take whatever he said as something that was self-evident.

You may say that I am again drawing my illustrations from such eminent examples that few can hope to reach the standard I offer. But the limbs of a giant are moved by the same muscles and the same principles of action as those of a man of moderate power; and the strength of that giant grew and was developed by the same processes of nature by which the infant grows into the man. And if you could trace how these great men became great, you would find it was by being trained and disciplined by slow and persevering effort. If "*non omnes omnia possumus*," it is hardly less true that every man may do any one thing he may desire, if he will give his attention and his best efforts to the work. We are told that one great cause of Erskine's wonderful success at the bar was the sedulous care and attention with which he cultivated the special powers that he called into exercise in the management of causes, before he entered the profession. And yet when this unsurpassed advocate was transferred to

the woolsack, for which he had not prepared himself, he failed signally, and made only an indifferent chancellor. And in this connection I venture to quote the language of M. Loisel, an eminent French advocate in the sixteenth century, as given by Lord Mackenzie in his work on the Roman Law: "In short I desire in my advocate the contrary of what Cicero requires in his orator, which is eloquence in the first place and then some knowledge of law; for I declare, on the contrary, that an advocate should, above all, be learned in law and practice, and moderately eloquent, — more a dialectician than a rhetorician, and more a man of business and judgment than of great or long discourse."¹

When, therefore, I insist upon clear thought and clear statement on the part of an advocate, I do not go beyond what any lawyer of fair powers, and with tolerable training, can attain to, if he is willing to make the effort. Instead of that, not a few, for the want of this self-discipline, start without any plan, and are content to follow in the line of examination of the witnesses, and only know when they have got through, by having gone over all that had been said in the course of the trial, without attempting to show the consistency or coherence of its parts. One important part of an advocate's duty is to separate and throw out of a case, by an analysis of the evidence, whatever is extraneous to, and does not bear upon, the issue to be tried, and thus to relieve the minds of the jury from trying to understand and apply them. But it is often very unsafe to treat a piece of evidence

¹ Page 396.

as irrelevant, and not worth attention ; since other and distinct facts may often be developed in the course of a trial, which may give significancy and effect to what seemed at first so unmeaning in itself.

3. I allude to this, for one reason, because of its bearing upon the controverted point of circumstantial evidence. Convictions are often obtained for high and aggravated crimes by a chain of events, not one of which by itself has any direct tendency to fix the guilty act upon the party charged. And yet, when brought together in their consecutive order, they may prove as satisfactory as if a dozen witnesses had sworn directly to the very act. A man is found dead with a pistol ball in his brain. On or near his person is a piece of paper which has the marks of having been the wadding of the pistol, which, on carefully being opened, is discovered to be a part of a newspaper. Ten miles from there a man is arrested upon suspicion, and in his premises is found a pistol which the ball fits, and on his person a part of a newspaper corresponding to the piece which had formed the wad of the pistol. This is no fancy sketch, but this, or substantially cases like this, have been presented to the minds of reasonable men, and left not a doubt of the guilt of the accused. Such a coincidence of events from mere accidental causes is contrary to human experience, and does violence to all the laws of probability. And whoever insists, as some do, that it is never safe to rest a verdict upon circumstantial evidence, might, with equal propriety, go further, and contend that a ver-

dict can never be satisfactory which rests upon positive and direct testimony, because witnesses may be, and have been at times, known to be false and perjured. It is only from circumstances that we judge of a man's motive and intention in what he does, especially when we undertake to impute to him bad motives and criminal intent. And I may add, the whole doctrine of legal presumptions depends upon the same idea as gives force to circumstantial evidence.

But still the subject is not to be passed over without a single suggestion, by the way of caution on the part of the advocate against whose cause it is attempted to make use of this species of evidence. In the first place, if there be a crime charged, be sure that the *corpus delicti*, the act itself upon which the whole case in fact rests, is first clearly proved by positive proof. The case of the uncle and niece, put by Lord Coke, has become familiar, where it was proved that she was heard to say, "O good uncle! do not kill me," immediately after which she disappeared; and, upon his being charged with having murdered her, he attempted to pass off another girl for her, which was exposed, and he was convicted and executed. The one essential proof was wanting, to wit, that the niece was dead; which became apparent too late, when, some time after, the niece appeared, having run away from her uncle after his chastising her for some fault. So it may be added, that counsel should scrutinize such evidence with great care to see that the links of the chain are complete and united by satisfactory evidence.

4. Notwithstanding the time I have spent upon this subject, there are one or two suggestions which I might offer bearing upon the same general course of remark. It will be found upon analyzing almost any case, that it presents itself to the mind of careful and observing counsel in distinct parts, each of which it is often necessary to discuss and examine by itself, as well as in the connection with, and bearing it has upon, the main point or issue which is to be settled. And this is to be done step by step, in such an order as will lead on directly to the main purpose of the trial. It may be the credibility of a witness, or the consistency of the parts of his story, or the truth of some incidental fact, or the discrepancy between two pieces of evidence and the like.

But in this the counsel should be careful to discriminate between what is incidental and of secondary importance only, and what is essential and material. If he bestows equal labor upon each, or if he puts forward doubtful proof with the same confidence and earnestness as he does that which is well sustained, he is in danger of misleading the jury as to what the real merits of the case are ; and it gives his adversary, if adroit, a chance of selecting some of these collateral issues, and, by showing them to be weak, he really detracts in that way from the force of the parts which cannot fairly be questioned. Raising side issues, and diverting the minds of a jury from the main one, is not a rare expedient in the experience of ingenious men at the bar.

5. During the argument of almost every case, it becomes necessary for counsel to refer more or less freely to the testimony which may have been given upon the trial, and of which I have assumed minutes, more or less full, to have been taken.

The force and effect of this ought, and, in most cases, do depend upon the accuracy with which it is stated. But the minutes of counsel, always defective, often disagree, and this leads to unpleasant controversies and disputes as to what the witness really did testify. Even if counsel do not depart in the main from what was said, there is a false coloring often given to it by him, when repeating it, which the opposite counsel feels bound to object to; and in this way conflicts spring up between earnest and honorable men, which add any thing but dignity to the cause or the court itself. But the matter does not rest there. If a jury detects an advocate in repeated attempts to palm off upon them as testimony a garbled or colored statement of what a witness did say, they set him down as not to be relied on, and distrust him when he really is stating the truth.

If you have no higher motive than good policy, let me urge upon you the importance of dealing fairly with a jury in the matter of evidence. You cannot afford to gain a bad or doubtful case by weakening, in so doing, your power to carry through another where you have right on your side. It is much better policy to show the jury that you mean to keep good faith with them. You, in that way, start with an advantage of which no cunning or adroitness

on the part of your adversary can deprive you. The idea that a lawyer is honest goes a great way in convincing a jury that his case is a good one.

6. This subject is connected with another which is of great interest to a lawyer in more ways than one, and that is the conduct and deportment to be observed between managing counsel and between them and the court. In the trial of every case, there are apt to occur things which tend to disturb the ordinary equanimity of those who are engaged in it. The counsel has to be constantly on the watch to see that nothing is omitted which can make in favor of the side he advocates, or admitted which can make against it, and may be properly excluded. In the suddenness in which this has often to be done, it is not surprising that collisions should occasionally occur. Besides, the tax that such a trial is upon one's nervous energy often produces a state of nervous excitement, which, with an undisciplined temper, is in danger of degenerating into downright passion, which, however brief, becomes an example of what the outsiders call "lawyers' quarrels," and, however much these may interest spectators, they add little to the dignity of the bar.

So long as lawyers are possessed of the ordinary weaknesses of human nature, it can hardly be hoped that courts will wholly outgrow such occasional exhibitions. But the history of the bar of the country, during the last three-quarters of a century, shows such an improvement in this respect, that almost any thing may be hoped for at no distant

day. The laws of gentlemanly courtesy among the profession are more generally observed, while the deportment of the court to the bar is at the same time more courteous and considerate. The time has happily gone by, and we may believe for ever, when a man of so much dignity and self-respect as Fisher Ames could say of a judge of the Supreme Court, that "to get a hearing in his court one must come with a speaking-trumpet in one hand and a club in the other."

I need hardly add that this has been a growing element of strength in the profession. Everybody feels the magnetic power of gentlemanly courtesy and good-breeding, whenever he comes within its influence. It tends, at once, to win confidence and command sympathy and esteem; and one may often, in that way, gain an access to the conviction of another, which would be barred to ill-bred rudeness. And what is true in private life, is quite as much so in the intercourse at the bar. To give it full force, does not detract, in the least, from the earnestness and effectiveness with which one may rightly insist upon the claims of his client, or from the respect which is due to him from others. And as a weapon with which to repel rudeness or bad manners, it is as much more effective than the bludgeon of the blackguard, as it is more polished. And if I were to mention some of the strongest elements of power on the part of those who have ranked highest in the scale of successful advocates, I should give a prominent place to that self-control by which they never allowed themselves to be jostled out of their pro

priety by interruption, or diverted from the line of argument which they had marked out for the conduct of their case, by the cavils or criticisms of opposing counsel, or the one-sided bias of a judge who fails to see what is so clear to the vision of the advocate.

The power of doing this, it must be admitted, is a most enviable one, and to possess it implies a degree of culture and resolution which can only come of training and thorough education ; for it is not easy to sit still and hold one's peace when he sees one position after another, on which he had relied with confidence, declared untenable by the judge, and the foundation on which he has rested his case crumbling away from beneath his feet. And yet the lawyer is constantly reminded that he cannot afford to enter into altercation with the court. The judge not only always has the last word, but enforces it at his pleasure. Such a contest, on the part of the advocate, is like a war of words with an editor through the columns of his own newspaper. He should, moreover, remember that, ordinarily, the judge who tries a case has no possible motive to decide otherwise than what is right ; and that he looks at the question from a point of view at which he sees both sides of it. It is, therefore, unwise on every account for a lawyer at the bar to allow his personal feelings to become enlisted against the judge, even as a matter of policy ; since it is better to have a friend at court, than to have to overcome an adverse counsel and an adverse judge too.

And yet, I would not advocate a poor and trem-

bling spirit, which would shrink from maintaining what one believes are his client's rights, whatever it may cost. There are some things which a lawyer may not compromise, and this is one of them. When Erskine stood up for his client, the Dean of St. Asaph, against the dogmatism and pride of opinion of Judge Buller, the lawyer was right and the judge was wrong; and the liberty of the English and the American press, to-day, is due, in no small degree, to the bold and fearless denial, by that eloquent advocate, of the doctrine which the judge insisted upon as law. Such precedents are so exceedingly rare, that they are hardly to be taken into account in laying down a course of professional duty of the bar towards the court. That of Mr. Choate was a much wiser one than to be looking out for encroachments by the court upon the province of the advocate. No man ever saw him betrayed into an expression of discourtesy towards the court, or a harsh expression towards an opposing counsel or his witnesses. If his criticisms were keen and even severe, they never came in the form of ungentlemanly language or rudeness of manner.

Instances will occur, I doubt not, to every one who is at all familiar with courts, of eminent and distinguished lawyers whose calm and dignified habits of self-restraint have been symbolized in their very countenances and manner of deportment. It was wittily said of one of this class, who ranked among the leading members of the Massachusetts bar, that "he won all his cases, because he gave his own face in evidence when he tried them." An anecdote

bearing upon this power of self-control, that has all the effect of being what one seems to be, used to be told by the late Chief-Justice Parker of Massachusetts, of his friend Chief-Justice Parsons while at the bar. He had been called to Portland to defend a criminal, and had prepared himself with great pains and much research, as the case was one of no ordinary interest, and involved several new and important questions. But though he brought into the conduct of the case an immense amount of learning, as well as skill and ability in analyzing and presenting it to the jury, he did it so simply and in such a quiet, unpretentious manner, that they received it as something which anybody could understand, and had no difficulty in coming to their verdict. Some one, who had witnessed and appreciated this exhibition of forensic skill, had the curiosity to inquire of the foreman what the jury thought of Mr. Parsons as an advocate. "Oh!" said he, "we did not think him much of a lawyer; but he appears to be a pious, good man."

Those who are accustomed to contests at the bar, have witnessed at times the advantage of this self-control, which can be acquired by training and habit, where a passionate, choleric advocate has been opposed to one of a cool temperament and disciplined habit, in the advantages the former is constantly giving to his adversary by his haste and zeal, and upon which he has occasion to look back with regret and even mortification on reviewing the case in his cooler moments, when it is too late to retrieve his loss of it. And the lawyer who watches the course of other lawyers may soon find that an advocate

cannot afford to be discourteous to the court or his fellows at the bar, even on the score of profit and loss in a business point of view.

Although I have more than once urged upon your attention the importance of habit to a lawyer, in the ease and skill with which he does a thing, I cannot forbear adding a few words upon the same power of habit in this very matter of professional deportment and conduct of a case. If he begins by exercising the same watchfulness and self-restraint which he is conscious of doing in his intercourse with gentlemen in private life, in what he says and does at the bar, he would be as little likely to be betrayed into rudeness or indiscretion as an advocate, as he would be as a gentleman in social life. And in the matter of skill in reviewing and arranging the order of his testimony, and the course of the argument he is to address to a jury, he would himself be surprised to find how the repetition of such an effort facilitates the work of doing it. And, in this way, a man with no particular logical powers originally, finds himself, almost intuitively, ready at the close of a long trial to rise and proceed at once with an argument, the parts of which seem to fall in as he proceeds, as it were spontaneously, where they are needed, accompanied with so much of the testimony as is adapted to sustain the proposition which the advocate would establish.

There is, doubtless, a great difference between able advocates in this readiness of arrangement of their thoughts and arguments; but, I have no doubt, if one could study the history of their minds, he

would find that not a little of this difference has grown out of the mode of early discipline, and the *habits* they then formed of analyzing the subjects they had to deal with, and the arrangement of the arguments by which they reached their conclusions. This, by repetition, becomes as it were, the intuitive action of their minds, and requires very little effort to give it effect.

While such is the power of good habits, the same is equally true of the slavery into which bad habits bring a man ; and while the one should be sedulously cultivated, the other should be as carefully deprecated and avoided. Nor should a young man ever forget that, under Providence, every one is the architect of his own fortune, and that the structure which he rears by his own hand is that in which life is to be to him a curse or a blessing.

7. If, in treating of a trial, we assume that the counsel have made their arguments upon one side and the other, the next step is the charge or instruction to the jury by the judge who presides at the trial.

In doing this he generally recites more or less of the testimony which has been given, with comments ; but his more specific duty is to instruct them as to the law which they are to apply in settling the issues before them. Whatever he lays down as the rule by which they are to be governed is taken to be the law of the case, which the jury have no right to reject or disregard. The only way of correcting any mistake in this respect is by carrying the matter to

the court of last resort, and having them pass upon it. For that reason it is always well to ask the judge, before he commences his charge, to instruct the jury as to the law of the case, if there is any thing special in it, in the way the counsel may think the law to be, thus laying the foundation for *excepting* to the judge's instruction, if he should fail to sustain the desired ruling.

The counsel should, moreover, carefully watch and note down the rulings of the judge in his instructions to the jury, for the same purpose ; and if it be new matter with which he is dissatisfied, it is often best to call up the points to the attention of the judge after the close of his charge, and before the jury retire, that he may, if he sees fit upon second thought, limit or explain what he may have laid down in an exceptionable form. The advantage of doing this is, that it brings the matter so distinctly before the mind of the judge that, if the counsel afterwards seeks to except to it, the judge cannot cavil by attempting to limit and qualify what he, in fact, said to the jury. Even judges have their weaknesses ; and some of them, at times, shrink from certifying that they have made a mistake, when it is a fact that they have done so.

LECTURE IX.

PRACTICE. — *Continued.*

1. Effect of Verdict, and Objections to same. — 2. Polling the Jury. — 3. Motion in Arrest of Judgment, &c. — 4. Exceptions.
5. Motion for New Trial. — 6. Special Verdicts. — 7. Arguments of Questions of Law. — 8. Yielding to Defeat gracefully. — 9. Writs of Error. — 10. Mandamus, Certiorari, &c. — 11. Miscellaneous Details of Practice. — 12. Courts of Probate. — 13. Courts of Equity.

1. The next step in the order of a trial, after the charge of the judge to the jury, and their retirement for deliberation in charge of an officer, is the rendition of their verdict if they are able to agree upon one. Few things try the nerves of a young advocate more severely than the few moments' interval between the return of the jury into the courtroom and the enunciation of their verdict, by which he is to gain or lose the case whereon he has expended so much care and labor, and in relation to which he has had so deep a feeling. I doubt if one in fifty of the profession ever get such coolness and self-possession in their practice as not to feel a slight flutter when the door of the jury-room opens and the panel make their appearance.

The form of verdict is very simple. In civil matters it is usually, if not always, in writing and sealed up. The clerk asks the foreman if the jury

have agreed upon their verdict. If he says they have, he hands the papers to the clerk who opens the paper, reads it, and then, calling upon them to hearken to their verdict as the court has recorded it, proceeds to read it aloud in their presence, adding, "so you say, Mr. Foreman; so say you all;" and their silent acquiescence affirms it.

If you ask what, if any thing, there remains to be done by counsel, I answer, it depends upon circumstances. If the verdict is in your favor, all that remains on your part is to file the necessary papers for making up the judgment and costs, and to take out an execution for the same from the clerk's office. But in a sharply contested case the course of even the prevailing party is not always so smooth. Your adversary may be dissatisfied with the rulings of the judge as to matters of law, and may choose to have them revised by a court of last resort. In that case you are to watch his course, and see that his exceptions are just and well founded, and have the rulings of the judge stated as they were given. Or he may make a motion for a new trial, or in arrest of judgment, which you will have to encounter and overcome before you can get a final judgment in your favor. What these are, and how they operate, will appear, if we assume that the verdict is against your client, and you are seeking to correct what you believe to be a wrong decision.

2. In the first place, I might have said, that, in many of the States, if after the clerk has read the ver-

diet and the counsel is dissatisfied with it, and has any reason to conjecture that it is one in which all the jury have not united, or any of them will shrink from avowing it when personally inquired of, it is competent for him to have them asked severally, if they agree to it, instead of assenting in the general form which I have given above. This is called "polling the jury." And if any one fails to answer in the affirmative, the verdict is not received. In some of the States, this is said to be the right of the losing party. In others, it is a matter of discretion whether the court will allow it or not. In Massachusetts, it has never been allowed.¹

The verdict of which I have been thus far speaking is a general one, finding the issue presented by the pleadings for one party or the other, and not what is called a special verdict, of which I may have occasion to speak hereafter. In the mean time I pass to the various grounds and modes of objecting to the rendition of a judgment upon a general verdict, which may be taken by the party against whom it is rendered. And, as judgments in actions which are tried during the term of a court are not generally rendered until the close of the term, counsel have that space of time in which to take the requisite steps towards avoiding the effect of the verdict which has been rendered.

3. Taking these steps somewhat in their order, the first would be a motion in arrest of judgment, or, in some cases, a motion for judgment in favor of the

¹ Bouv. Inst. § 3259 ; 12 Pick. 512.

party against whom the verdict has been rendered, notwithstanding the verdict, or, in technical phrase, *non obstante veredicto*. I am to be understood in this as speaking of actions and proceedings at common law, and in cases where a verdict has been rendered by a jury, and where, too, the common law has not been altered by statute, as it has been in Massachusetts, by which no "judgment can be arrested" for any cause existing before verdict, unless the same affects the jurisdiction of the court."¹ Though, I believe, the common law in this respect has never been changed in criminal proceedings.

The ground of arrest of judgment is, that, if every thing which is alleged in the proceedings of the case and is found true by the verdict, as the same are spread out in the record, is true, it forms no legal and sufficient ground of action. The defendant party may have done or said every thing that is set forth in the plaintiff's declaration, or is established by the verdict, and yet may not be liable in damages to the other party. The readiest illustration of this which occurs to me is an action of slander for words spoken. In the first place, the plaintiff has to prove them, substantially as laid in his declaration. If he succeeds in doing this, and the verdict is in his favor, the question is still open to the defendant to insist that the words, if spoken, are not actionable.

That was true in the somewhat leading case of *Bloss v. Tobey*,² where the allegation was that the

¹ Gen. St. c. 129, § 79 ; 2 Bouv. Inst. § 3295. ² 2 Pick. 320.

defendant had said the plaintiff had burned his store, and the jury found him guilty of saying these words. But as there was no law against a man's burning his own store, if he had no intent thereby to cheat or wrong anybody, and as there was no such intent alleged in the declaration, the court held that the charge was not actionable, and they arrested the judgment, as if no verdict had been rendered. ○

A counterpart to such a defect as this is where the plea of the defendant, when examined and analyzed, is found to be no answer to the claim made by the plaintiff in his writ and declaration. It will be remembered that, in pleading, where one party undertakes to avoid the effect of what the other party has alleged, by setting up some new fact, he admits what facts the other party has properly stated in his declaration or plea to be true. If, therefore, the defendant seeks to avoid the effect of the plaintiff's declaration by pleading some fact specially, and not the general issue, and that fact is found for the defendant by the jury, it is competent for the plaintiff nevertheless to move for judgment, *non obstante veredicto*, on the ground that if the fact is true, it is no reason why the plaintiff should not have his judgment, because it is no answer or bar to what the plaintiff claims in his declaration and the other party has admitted to be true. It is, in other words, a mere collateral fact and no part of the real issue between the parties. I hardly need add, that the questions raised under either of these motions are purely questions of law, growing out

of the record of the whole case, and are to be determined by the court alone.

4. A second and much more common mode of raising questions of law, with a view of correcting mistakes of the judge who presides at the trial of a case, is by *exceptions*, as it is called. But it is to be remembered that exceptions do not lie to every ruling of a judge, however unsatisfactory it may be to counsel. In many things connected with the trial of a case, the judge has unlimited discretion; and there is no way of revising the manner in which he exercises this, except by a second appeal to his discretion: no other court can do it. Among these would be, — the granting of a postponement or delay of the trial, whether and upon what terms to allow amendments in the pleadings, and the like. But if the judge admits evidence when objected to; or rules upon the construction of a contract, or the validity and effect of a matter set up in defence; or instructs the jury upon any matter of law in the case, which bears upon the verdict they are to render; or refuses to admit evidence or give instruction in conformity with the motion of counsel to that effect, and the verdict is against the party who is dissatisfied with such rulings, — he may have the same revised by a court of last resort, with a view of obtaining a new trial if such rulings are not sustained by the latter court.

The mode in which this is done is, for the party against whom the verdict has been rendered, and before judgment is entered thereon, to apply to the

presiding judge to allow and certify a bill of exceptions, which the counsel draws up and presents to him for that purpose. In doing this, the counsel states enough of the pleadings and facts in the case to show clearly how the question he wishes to have revised was raised and became important; he then states the ruling as it was made, and that he excepts to it, and prays to have his exceptions allowed and certified. Care should be observed to so state the case, that the court who are to revise it shall have the same facts and circumstances before them as the judge had who tried the case; and it is never competent to either party to argue from any thing which does not appear upon the record, which includes the bill of exceptions. If the judge allows and certifies the exceptions, the whole case goes to the revising court, where the questions of law are to be argued, and the exceptions allowed and a new trial granted, or overruled and judgment entered upon the verdict. I will merely add, that exceptions lie only upon matters of law, nor will they lie to what is merely an abstract proposition, which does not bear upon the ultimate finding by the jury.

In some of the States questions of law, arising in the course of a trial, are reserved by what is called "a report" by the judge, which is substantially a bill of exceptions drawn up by the judge who tries the case. It states the history of the case, the points of law raised, and the rulings thereon; and the whole case, with this report, goes to the revising court as in the case of exceptions, who hear argu-

ments thereon, and either affirm the verdict or grant a new trial, as the case may be.

5. Parties often endeavor to avoid the effect of a verdict against them, upon grounds other than those I have already mentioned, by applying to the court to grant them a new trial. The grounds upon which this may be done are various, — some of them addressed to the discretion of the court which tried the cause ; others assume that some of the proceedings in the trial have been against law, as that the ruling of the judge was erroneous, or that the jury have rendered a verdict against the law as the judge laid it down in his instructions to them. Perhaps the most common ground on which these motions are made is that the verdict is alleged to be against the evidence and the weight of evidence. Sometimes it is assumed that the damages given by the verdict are excessive or inadequate, as the case may be. In all these cases, the application is based upon the idea that there has been a mistake, either in the trial or the verdict rendered ; and that justice requires that there should be a retrial in the same court in which the original one was had. The mode in which the application is usually made, is by a written petition to the court setting forth the grounds and facts on which the new trial is asked, accompanied by an affidavit of the party or his counsel as to any new or independent facts upon which the motion rests.

I may add, that the power of the courts in this respect is very broad, and that it is often competent

to grant a new trial as to some particular matter or thing which had been raised in the former trial, without opening the whole case again. This power of granting new trials, though it may sometimes almost seem to be arbitrary, must be deemed a highly salutary one, as without it the institution of trial by jury would be in danger of losing its hold upon the confidence of the public. It serves as a safeguard against the passions, prejudices, and mistakes to which juries are at times subject, inasmuch as they have the ordinary weaknesses of human nature. Where the objection to the verdict is in the amount of the damages allowed, and the court is not only satisfied that there has been a mistake made, but has some test or standard by which to ascertain, approximately, what the amount should be, it is not uncommon to leave the matter somewhat to the election of the plaintiff to remit the excess above what this may be, or have a new trial granted. Where the judge upon the trial has correctly instructed the jury as to the law, and they have rendered a verdict which is incompatible with such ruling, it must be obvious that the only way in which this mistake of the law can be corrected is by granting a new trial. It cannot be the ground for exceptions, inasmuch as there has been no misdirection as to law on the part of the court. In such cases, the application is upon the ground that "the verdict is against the evidence under the instruction given to the jury."¹

A still different ground of application for a new

¹ 5 Mo. 155; 18 Pick. 15.

trial is the discovery of new and material evidence since the prior trial by the party who moves for it. To lay the foundation for such a motion, the applicant must state in writing the facts which he expects to prove as having been newly discovered, in order that the court may see that the evidence would be material and important to determine the issue which the jury originally had to try. In the next place, the party making the application must aver and be able to satisfy the court that it has been discovered since the former trial, and that he is in no fault in not having sooner discovered it. It must further appear that the evidence is not cumulative, that is, merely additional evidence upon some point on which other evidence was offered at the trial. It is incumbent upon the applicant, in such case, to prove affirmatively all these facts, in order to claim a new trial upon the ground of newly discovered evidence.

Another ground upon which it is said courts will grant new trials, is misconduct on the part of the jury who rendered the objectionable verdict. But as such misconduct in the jury-room cannot, in Massachusetts, be proved by the testimony of the jurors themselves, it is rare to sustain such application by proof.¹

The province of a jury is to settle facts at issue between litigant parties, while that of the court is to apply to these the appropriate rules of law, and thereby fix the rights of the parties, and provide a remedy for the injuries complained of. Nor can such questions be settled in any other way, under

¹ 1 Gray, 105.

the rules of the common law. And if the judge who presides at the trial instructs the jury that this or that fact which is in question is true, it will be the ground for a new trial. As where the action was to recover damages for fraud in the manufacture of shingles, and some of the articles manufactured were brought into court, and the judge told the jury that they were not shingles, but mere chips, a new trial was granted.¹

6. Ordinarily, the verdict of a jury is what is called a *general* one; and being rendered in view of the law of the case, as stated to them by the court, it settles the case, for that trial at least. But in criminal trials especially, juries sometimes find the facts in controversy specially, without returning a verdict of guilt, submitting it to the court to decide, as a matter of law, whether the defendant is guilty of the offence with which he is charged. So in some cases it is desirable to settle some one or more facts in a case which the court are not competent to try, to be taken into consideration, with other facts which are either admitted or are within the province of the court to determine, in reaching a final judgment in the matter before them. Where this is done, the jury return what is called a *special verdict*, as distinguished from a general one.

This is the usual course in matters of probate and equity jurisdiction, when it becomes necessary to try and settle an issue at common law which forms a part of a general issue which such courts are com-

¹ 12 Pick. 268.

petent to settle without the intervention of a jury. Thus, for example, a will is offered for probate in a court having cognizance of such matters. It is contested on the ground that the testator never executed the instrument, or was not of sound and disposing mind when he signed it. Provision is made whereby an issue is made up to be tried by a jury in a proper court, where this single point is alone settled by their verdict. And that point being determined, the court go on in their proceedings as if the same had been a conceded fact.

In England, as we learn from Blackstone, the mode in which questions of fact arising in hearings before courts of equity are raised and settled by a jury in a court of common law, is by a feigned issue, raised in an action upon an assumed bet; wherein one party alleges that he and the adverse party have laid a wager as to the fact in question being true, and the finding of the jury binds the court of equity.¹ With a much better show of good sense, the courts of this country are so organized that they can raise a special issue to be tried before a jury, according to the forms of the common law, substantially in the manner above mentioned, for settling questions of fact in probate matters, in which the jury finds the specific fact which it becomes necessary to establish. In some of the States provision is made by which a jury may be altogether dispensed with, and the issues of fact as well as of law may be referred to the judge or court alone.

Thus far we have assumed that, in order to reach

¹ 3 Black. 450.

a final conclusion in respect to the rights of two contesting parties, it has been necessary to settle some question of fact in respect to which they are at issue. But it is often the case, that the only question between the parties to a suit is one of pure law, and not one of fact. In such cases they usually draw up a formal agreement as to what the facts are, and submit the same to the court, to render judgment for the one party or the other according as their view may be of the law. Such, indeed, would be the effect of a formal demurrer to a declaration or plea. It is virtually saying, suppose the facts to be as claimed, do they lay the foundation of an action if the demurrer is to a declaration, or of a defence if it is to the plea.

7. If now we consider the questions of fact as having been settled, and that the court trying the cause has come to a conclusion upon the law of the case, and either party desires to controvert this decision, an opportunity is offered, and usually in some one of the ways I have mentioned, to have these questions of law revised by some court of final resort, with a privilege on the part of the parties to be heard upon the subject by their counsel. And this argument regularly forms the next step in the progress of the suit. As nothing is open in such an argument but the questions of law, nakedly presented in the record of the case, the range of remark is generally very much circumscribed. There is little room for the play of the imagination, and less, ordinarily, for figures of speech. In such cases, the

most effective eloquence of an advocate is a clear analysis of the points he desires to make, with a direct, orderly, straightforward statement of the grounds on which he rests his case, and the reasons why the court should render judgment in favor of the side he espouses.

In doing this, the party who seeks to change the judgment which the court would have otherwise rendered, is to begin the argument, and he, consequently, also has the close in addressing the court. It is in the argument of these questions that one's learning is brought into play, as well as his logic and good sense. But learning does not always consist in a citation of cases. Counsel often load down their briefs by multiplying these without being careful to see that they bear directly upon the points they wish to establish. It is one thing to refer to a case upon the same general subject as the one under consideration, and quite another to select only such as directly, or by analogy, tend to sustain the position for which the counsel contends; and it is the latter only which add strength to one's argument.

The customary mode of presenting an argument is in the form of a brief, stating succinctly the positions which the counsel seeks to maintain, with the authorities upon which he relies, together with a reply to such positions as have been or may be taken by the adverse counsel. The brief is prepared beforehand, and furnished to the court when ready for the hearing, in a written or printed form, and a copy of it delivered to the adverse counsel.

8. Here I might assume that the action of an advocate, in a contested case in court, is at end. It would be pleasant at times, if it were possible, to let the matter drop out of his mind. He can have no further use for the facts which have cost him so much time and labor, and the sooner he forgets them the better. But the results of the trial it is not so easy to forget. One side must, of course, be the losing party; and the advocate who represents the defeated cause is rarely content with the result. It is often to him an act of injustice, for which he suffers in common with his client; while success on the winning side is, to the mind of counsel engaged, so exactly in accordance with what he knows it should be, that it comes as a matter of course rather than in the way of triumph of skill. The pain on the one side, therefore, is more sensible than the pleasure on the other; and this will probably be the experience of successive generations of the profession, till every lawyer becomes a philosopher.

One of the most difficult lessons he has to learn is how to bear defeat with equanimity; and I have known over-sensitive men leave the profession in disgust, under the feeling of chagrin at what they thought an unjust defeat. To bear such disappointments gracefully, is the result only of much training and a good share of natural fortitude. If you have done your duty, there is no occasion to torment yourselves by brooding over the possibility that you might have done better. The chance is, you will, in your cooler moments of reflection, find that you were wrong in your judgment, and that the court

were right in theirs. The only rule to be laid down for your guidance in this conflict of feeling is, to do your duty, and let the responsibility rest where the law has placed it, — on the court and jury.

9. I come now to the last mode of which I propose to speak, by which proceedings in court may be reversed; and that is *writs of error*. These, as understood at common law, are to reverse and avoid a judgment after it has been, in form, entered up as a finality, and not to arrest proceedings, as in case of exceptions or arrests of judgment.

In form, it is a new action, wherein the party against whom a judgment has been rendered is plaintiff, and the adverse party defendant. It is founded upon some material error in the proceedings in the former suit, which error is sometimes discoverable by examining the record of the court, and sometimes is shown, *aliunde*, by the proof of facts which do not thus appear. In the one case, it is called an error in law; and in the other, an error in fact. If, for example, by inspection of the record it should appear that the court which rendered the judgment had no jurisdiction of the party, the court would reverse the judgment for *error in law*.¹ If the mistake was in rendering judgment without having taken certain preliminary steps necessary to make it valid, but the necessity of which does not appear from the record itself, this fact has to be shown by proof *aliunde*; and the reversal would be for *error in fact*. Thus, for example, if the defendant in the

¹ 8 Met. 132.

original action had been a minor, and the plaintiff had proceeded to judgment in the action, without having had a guardian *ad litem* appointed by the court to take care of the minor's interests, it would render the judgment erroneous; but the fact would have to be shown by proof outside of the record.¹ In Massachusetts, these writs of error are issued by the Supreme Judicial Court, and, as a general rule, will only be issued in cases where the judgment has been rendered in a suit at common law. There is, however, a process answering to a writ of error, which may be sued out to reverse a judgment that has been rendered in a court of equity.² If the error alleged be one of law, the issue raised thereby is to be tried by inspecting the record of the former suit. If it be one of fact, the issue raised is to be tried, like any other, upon such competent evidence as either party may see fit to offer.

While an application for a new trial is, as I have said, often addressed to the discretion of the court, a writ of error is one of right, in respect to the issuing of which the court have no discretion. If in this proceeding the original judgment be reversed, the plaintiff in error is restored to all things which he lost by reason of such erroneous judgment.³

10. There are other processes issuable by the highest court of a State, which counsel are occasionally called upon to procure, which I will briefly notice. One of these is a *writ of mandamus*, which is an order in the form of a writ or precept directed

¹ 6 Met. 487.

² 11 Gray, 236.

³ 4 Mass. 417.

to a court of inferior jurisdiction, or some person or corporation holding some official character and bound to perform a certain duty, requiring him or them to do some act or thing which pertains to such duty or office.

Another is a *petition* and *writ of certiorari*, where the petition is addressed to the court, asking them to issue a writ to some inferior court, whose proceedings are not according to the forms of the common law, commanding it to certify its proceedings in some case wherein it is alleged that they have been against law. The petition contains a full statement of these proceedings and the particulars wherein they are alleged to be erroneous, and asks of the court, when the same shall have been properly certified to it, to vacate any order therein which the inferior court may have made, and quash the same. If, on a hearing upon such petition, the court shall be satisfied that a writ of *certiorari* should be issued, the same is granted, and the proceedings of the inferior court are arrested. But such a process is rather a matter of appeal to the discretion of the court to which the petition is addressed than one of right, like the suing out a writ of error.¹

I might go into still further details of practice in the courts in which a lawyer is occasionally called to engage; but I have already reminded you that I am not attempting to give you a treatise upon the practice of the law. I knew that some of you are about to enter upon a business which is in a great

¹ 20 Pick. 71.

measure new to you; and I thought the hints and suggestions of one who had been through the ordeal, and gained experience, if not wisdom, might be of some use as well as encouragement.

I have accordingly spoken, as you have heard, of office business, of giving chamber counsel, of dealing with clients, of the relations of advocates towards each other and the court, of the commencement and conduct of a case to its final disposition in court; and, brief and hasty as my remarks have necessarily been, I trust I have said nothing to detract from the true dignity or respect that belongs to a profession with which I have long esteemed it an honor to be associated. No civilized nation has ever been able to subsist without it; nor do I believe the ends of society, under a free government, could be attained without the instrumentalities of the law, and among them a class of advocates.

11. I have confined myself, however, thus far to the practice of the common-law courts, and may be thought to have omitted some of the more familiar parts of this; which is, indeed, true, because they are so familiar. Among them is the entering and defaulting an action where the defendant, though summoned, has failed to appear. Another is the degree of credit which the law attaches to the official certificates of its officers, showing that an act had been done. Thus, for example, if a sheriff certifies upon a writ that he has served it upon the party named in it as the defendant, the courts receive it as conclusive evidence that he has done so, and proceed

accordingly. This grows out of the necessity of the case ; since, if the courts were obliged to stop and verify every such certificate by proof, it would embarrass, if not defeat, judicial proceedings altogether. And it may be added in this connection, that wherever the law imposes upon an officer of its own creation, a duty of making a record of an official act, his official certificate of having done it will be received as evidence of its having been done.

I ought, perhaps, to say a word also of the forms of administering oaths to witnesses when testifying in court. In some of the States this is done by simply holding up the hand. In others, the witness kisses the book ; that is, the Bible containing the Gospels. In either form he appeals to God as the sanction that what he is to testify shall be true. If one has conscientious scruples against thus calling God to witness the truth of what he is to say, he is, I believe, everywhere allowed to testify under the sanction of the pains and penalties of perjury. And because of the absurdity of applying the ordinary sanction of an oath to the testimony of an atheist, if there ever was one, and, at the same time, not to exclude such unbelievers altogether, the same form is made use of in the case of one who has no Christian conscience as of one whose conscience is too sensitive to allow him to appeal to God whom he believes in and worships. The question once arose in England as to how far a Pagan could be admitted to testify in the courts of that country ; and it was at last settled, that, whether a man was Christian, Jew,

or Mohammedan, or "heathen Chinese," if he had any form of religion which recognizes an oath and prescribes the form in which it is to be administered, and he is called to testify, it shall be done in conformity to the requirements of his religion, whatever those may be.

One form of taking evidence I ought, perhaps, to notice, though it has become entirely familiar to most persons. One principle which pervades all our trials is, that no man shall be affected in his rights by the testimony of a witness taken *ex parte*, where he has not had an opportunity to cross-examine him. But as witnesses cannot be compelled to come from other States to attend courts here, and are often unable to be present at a trial by reason of age or sickness, provision has been made whereby the depositions of absent witnesses and such as cannot attend court may be taken, and used as proofs upon trials. But in this the law is careful to give the party against whom they are to be used an opportunity to be present at the taking of such testimony; or, if it is to be given in answer to written interrogatories, the adverse party may inspect these, and put such cross interrogatories as he may think proper, all of which must be answered by the deponent.

There are cases where depositions *in perpetuum*, as they are called, are allowed to be taken to procure and preserve evidence, before any action has been commenced. But this hardly comes within the proper idea of the practice of the courts.

The theory of depositions did not originally ex-

tend to criminal trials. The people of England had suffered so much under the monstrous abuses of the Star Chamber Court, that when their descendants established a constitution of government for themselves, they adopted, as one of the safeguards of its citizens, the precaution that every subject should have a right "to meet the witnesses against him face to face." And, what bears upon the institution of the bar as an element of personal liberty and protection, it secures to a party the right "to be *fully* heard in his defence by himself or his counsel." The meaning of this is, that, whereas by the English common law no man had a right to avail himself of the assistance of counsel in addressing an argument to a jury in his behalf, if charged with treason or other high crimes, but must rely upon his own unaided effort, the aid of counsel, both in matters of law and fact, was secured to every one as an elementary principle in our constitution. And now the defendant only in a criminal prosecution is at liberty to have the deposition of an absent witness taken, and used in his trial; but, to aid him in making his defence, he may by statute avail himself of such testimony.

12. While speaking of practice thus far, I have chiefly confined myself to that of courts of common law. Those with probate jurisdiction borrow their forms and modes of proceeding indirectly from the civil or Roman law, although the nature and limits of their jurisdiction are derived from the statutes of the respective States. Instead of a writ and decla

ration, the proceedings in these courts originate by a formal petition. Upon this a notice to all persons interested is issued and served upon them; and if, on the hearing consequent upon these, it becomes necessary to try and determine questions of fact, the judge or surrogate is ordinarily competent to do it. There are modes to which I have already referred, of submitting questions of fact to a jury, if such a procedure should become necessary. I will not dwell upon details of the practice in these courts, as they are ordinarily simple, and easily learned by any man of good sense, by observing how the thing is done.

13. In most of the States there are forms of process which have been borrowed, more or less entire, from the English courts of chancery. And although in some of the States these powers are exercised by courts having also common-law jurisdiction, in most of them the proceedings are distinct from those at common law. I should be leaving the matter obviously imperfect and defective if I omitted these altogether. They are, moreover, coming more generally into use as the interests of which these courts have cognizance multiply, and the relief which they furnish is found better adapted to the wants of a complicated state of society and business than the more simple and direct forms of the common law.

In England these courts, and the practice in them, are distinct from those of the common law. Mr. Warren tells us that "the practice of the courts of equity and that of the courts of common law

may be considered in the light of two separate and distinct professions. The difference between them is as clear and essential as that which marks any one business or profession from another." But no such distinction has been made in your reading or instruction, for the reason that it is not generally recognized in our courts. The practitioner in one is expected to be equally ready in the other, and to be able to distinguish, at once, whether a question submitted to him is to be referred to one or the other of these courts. Not only are the subjects-matter cognizable by courts of equity distinct from those of the common-law courts, but the forms of remedy and relief which they apply are equally distinct. Both have their rules and their technicalities; and there is as little chance for a hap-hazard judgment, under the idea of equity, in the one court as the other. The aim of each is to provide redress for injuries and a remedy for wrongs. The principal difference is in the mode of doing it. In the process of time, and the multiplication of new wants to be supplied, it was found that the common law was defective, in many important respects. As an illustration, the whole subject of trusts has grown up and been administered independent of the common law. So its remedies were found to be inadequate in cases of fraud, accident, and mistake; and equity was called upon to supply the needed relief. But in all these things its processes are supplementary to those of the common law, neither acting in place of the other.

If, therefore, one resorts to equity for relief, it is an

essential allegation in his petition or complaint, that he is remediless for the injury complained of, by the strict rules of the common law, and can only find adequate relief in a court of equity. Another distinction between the two consists in the form of the remedy which they respectively apply. While the common law acts directly upon the subject-matter of the controversy, equity only enforces its orders and decrees by acting upon the person of him to whom they are directed. If, for example, A. claims land which is in the possession of B., and seeks to recover it by suit at common law, and upon trial he establishes his title to the same, and his right of possession, the law sends its officer and removes B. at the same time that it puts A. into possession of the premises, thus giving him possession by the same general process by which his title has been established. On the other hand, if B. has made an agreement with A. to convey him a piece of land, but refuses to perform it, and A. goes into equity for his remedy, the court does not and cannot settle definitely and effectually that the land belongs to A., and give it to him specifically. But it may require B. to execute a satisfactory deed of the land to A., whereby he is made the owner of it; and if B. refuses to execute it, the only mode of reaching the land the court has, is by ordering B. to be committed to prison until he has complied with the order to execute and deliver the deed.

To illustrate this distinction still further, if we suppose in the last stated case A. had brought his action at common law for the refusal of B. to convey

the land according to his agreement, the question would have gone to a jury to ascertain the amount of damages thereby sustained by him; and the court would thereupon have rendered judgment, and an execution against B. for the amount of such damages in money; and A., instead of ultimately obtaining the land, would have been obliged to accept, instead thereof, of the damages thus estimated by the jury.

This measure of requiring a specific performance of a written agreement, instead of the payment of money, is one of the distinguishing characteristics of a remedy in equity. And another, which is quite as marked, is one of a preventive character, instead of giving a compensatory satisfaction for injuries already done. Thus, if the tenant of A. commits waste upon leased lands, A. may have an action at law to recover the damages thereby sustained; but if A., having learned that his tenant was intending to commit this waste, instead of waiting till it had been accomplished, had applied to a court of equity for an injunction, the latter court would have passed an order or decree restraining the lessee from committing the act, and would thereby have prevented its being done.

One of the most marked distinctions between the processes of the two courts is in the matter of parties. Passing over the circumstance that a wife may sue her husband in equity, which she cannot do at law, by the rule of law as laid down by Chitty,¹ "the action should be brought in the name of the

¹ Plead. 1.

party whose *legal right* has been affected, against the party who committed the injury, or by or against their personal representatives." And accordingly no judgment at law can bind any one who is not party or privy to the suit in which it has been rendered. Consequently no such judgment can affect such persons as are only collaterally concerned, but not sufficiently connected to be made parties to the suit. The consequence is, that suits have to be multiplied and repeated to reach and bind all whom it is desirable to include in the results of a judgment. And sometimes it is exceedingly difficult, if not impossible, to maintain suits at law where there are really questions of legal import to be settled by one party against another, by reason of some one of the parties being so related to both of them that an action cannot be brought without his being made plaintiff and defendant too, for which the common law has no form of remedy. Thus, suppose two partnerships having a common copartner in both, and a controversy to arise between the partnerships, no action at law would lie in such a case, because, as all the partners must be named on both sides, the common partner would become both plaintiff and defendant, and in fact be suing himself. But in such cases equity supplies this defect, and provides a mode in which such questions may be tried, and the persons interested be so made parties to the suit as to be bound by the judgment which may be rendered therein. So where persons are interested in the subject-matter of a suit, either in law or equity, equity makes them all parties, plaintiff or defendant,

and binds them by a single judgment, after having given them all an opportunity to be heard in the matter.

And while at law all persons having a joint interest in the subject-matter of a suit must join in the same as plaintiffs in order to carry it on, if in such a case one of these were to refuse thus to join, the other party may bring his suit in equity in his own name, by making the one interested with him a codefendant with the other parties to be sued. The only limit as to parties to be joined in a suit in equity seems to be that where they are very numerous, and have a common interest, like the members of a society, or the creditors of an insolvent debtor, and the like, a part only may represent the whole, and bind them by the judgment which may be rendered therein.¹

Another peculiarity which distinguishes courts of law from courts of equity is the mode in which they respectively settle questions of fact, in the issues to be tried before them. In the first place, the aid of juries is dispensed with, except in trying special issues, of which I have before spoken. The judge or chancellor ordinarily settles questions of fact and law too.

In the next place, at law, no man can be compelled to give evidence against himself in an action wherein he is defendant.² In a bill in equity, on the contrary, the defendant is directly interrogated, and required to answer upon his best knowledge

¹ Story, Eq. Pl. § 76 ; 1 Dan. 240, 273.

² 1 Greenl. Ev. § 353

and belief as to the matters and things charged therein against him; and his answer thereto becomes, in the hands of the plaintiff, evidence which he may use in the trial of the issue raised in the case. In some of the States, it lies with the plaintiff whether the defendant shall make these answers upon oath or otherwise. If he requires it to be upon oath, the defendant has the right to use the testimony therein given, in his own favor, if the same be responsive to the interrogatories put to him in the plaintiff's bill. This doctrine of drawing evidence involuntarily from an adverse party, by compelling him to answer his adversary's questions, is directly opposed to the genius of the ancient common law, and was borrowed from that of Rome, from which very many of the rules of equity were derived.

There is one other point in the matter of jurisdiction of courts of equity, which I ought to notice in comparing them with courts of law; and it is this. A suit at law ordinarily lies only as a remedy for some wrong or injury already done, where the judgment recovered is designed to supply that remedy as its ultimate purpose and intent; whereas equity lends it process by way of aiding parties who are prosecuting suits, it may be, in courts of law. This is done by what are called *bills of discovery*, whereby the respondent is called upon to disclose facts that are within his personal knowledge, or to produce and exhibit papers and writings in his possession, with a view of their being used in a trial then pending, or to be commenced in some

other court. This gives rise to a familiar classification of bills in equity into original bills which pray for relief, and original bills which do not pray for relief, in the latter of which bills of discovery are included.

LECTURE X.

PRACTICE. — *Continued.*

1. Equity Procedure. — 2. Masters in Chancery, Arbitrators, &c. — 3. Transferring Causes from State to United States Courts.
4. *Habeas Corpus*. — 5. Constitutional Law. — 6. Politics. — 7. General Reading. — 8. Progress and Reform. — 9. Influence of the Bar on Legislation. — 10. Influence of the Bar on the Judiciary. — 11. Power of the Bar how exercised. — 12. Conclusion.

1. If now we consider the proceedings in equity somewhat more in detail, we shall find, instead of the writ and declaration in a suit at law, the bill and *subpœna* which answer to these. The bill is in form a petition addressed to whatever judge or court has chancery jurisdiction, setting forth the names of the parties, the grounds of the plaintiff's claim for relief, fully and particularly; or, in other words, his cause of action, and why he seeks relief in equity rather than law. There are certain formal and orderly parts of every bill, which the pleader should be careful to observe. No great precision, however, need be regarded in the form of the plaintiff's statements and allegations in his bill, except that it should not contain superfluous or foreign matter, nor any thing scandalous or impertinent. Nor should it be what is called multifarious; that is, join in one bill several distinct and independent matters.

The bills most generally in use are such as pray

relief, and have a certain order in their parts, among which the "*stating* part" is the most important, as it contains the narration of the facts and circumstances upon which the plaintiff relies for the relief he asks, or the decree he prays for. This must be done so fully, clearly, and distinctly as to present each material fact by itself, so as to admit and require evidence, if need be, of the facts therein stated. The "*confederating* part," as it is called, usually follows; but it is ordinarily merely formal, and may be omitted altogether. Next comes the "*charging* part," which is by way of anticipating what the defendant is to set up in defence to the bill, though this is not deemed to be an essential part of the bill. The next in order states the ground upon which the court has jurisdiction of the case; viz., that the plaintiff is without adequate remedy at law. Even this may be omitted, if the *stating* part shows clearly that the court has jurisdiction. Then follows the "*interrogating* part," or the matters which the defendant is expected and required to answer. And lastly comes the clause which prays for the relief, or order and decree which the plaintiff seeks by his bill. This relief may be general, or specific in its terms and character, according to the nature of the plaintiff's case.

Though, as I have said, these are the customary parts of every bill, and it is generally the safer way for a young lawyer to follow precedents in his practice, several of them, I apprehend, might be omitted with impunity; for, if the stating part is full and definite, the defendant would be held to answer

every material allegation therein, if no specific interrogatory to each were propounded in the bill. The prayer in the bill always concludes by asking that a writ of *subpœna* may issue from the court. This is a precept which requires the defendant to appear at a certain time and place, and make answer to the bill under a penalty named therein. This precept is served upon the defendants severally, if more than one, who are named in the bill and is the notice to them to appear as required. If the bill merely seek discovery without relief, it is varied in form so as to indicate to the defendant what is prayed for.

To this bill the defendant either *demurs* or *pleads* or *makes answer*. If he denies that he is bound to answer, because the court has no jurisdiction, or for any other cause, which appears in the bill itself, he demurs, or admits what is set out in it, and prays judgment if he is bound to answer to it. If he relies upon some fact as a reason why he should not answer to the bill, and that fact does not appear upon the face of the bill, as, for instance, that the claim of the plaintiff is barred by the Statute of Limitations, he *pleads* it, and insists that the bill should be dismissed.

But the usual way in which the defendant seeks to meet the allegations in the plaintiff's bill is by what is called his *answer*. In this he either confesses and avoids, or traverses and denies these by stating facts by way of rebuttal; and it is incumbent upon him thereby to confess or traverse the substance of each and every charge in the bill. In this way,

issues of fact and law are raised in suits in equity, which require to be argued by counsel; and the same suggestions are applicable to these which I endeavored to present in connection with the argument of causes in the courts of law. And I ought to add, that I have dwelt as long as I have upon the subject of equity proceedings, not with any expectation of presenting it as a system, but to give you some idea of its nature and purposes, and to impress upon you its growing extent and importance; and that if a young man expects to command business in his profession, he must make himself, to some extent, a master of the science of equity.

I cannot leave the subject of equity pleadings without impressing upon you the importance of cultivating a neat, clear, compact, and direct style of composition in drawing them. If you were held up to the ancient restricted rules of special pleadings at law, there would be less occasion for such a suggestion, as you would do otherwise at the peril of being mulcted in costs. But the tendency of late, in the laxity of modern codes, has been to break away from any undue stringency, by paying little regard to technical nicety in forms. Declarations have practically become narrations, and pleas are changed into more or less formal answers. The discarding special demurrers, however, is an admitted triumph of common sense, when we remember that they were the merest traps and quibbles, by which the administration of justice was obstructed by the sharp practices of technical pleaders. As an example of this I might refer to the case of *Berdoe v. Spittle*,¹ where

¹ 1 Exch. 175

the plaintiff, having made use of a blank printed form of a writ, in declaring that the plaintiff had done and performed certain labors and services for the defendant, at *h*— request, accidentally omitted to fill the blank after *h*— by the two letters *i* and *s*, so as to read *his*. The defendant demurred specially to the plaintiff's declaration, and the same was held to be bad.

But still a lawyer owes it to himself, as well as the court, to avoid the careless, slovenly way in which bills and answers are sometimes drawn, which betrays a want of knowledge at the same time that it violates good taste. If one will accustom himself to a careful preparation of his cases, and will study to present their points just as they lie in his own mind, leaving out all foreign and unnecessary matter, he may soon acquire a habit of doing his work in a neat, compact, and lawyer-like manner, and will find it just as easy to do it as to indulge in a style the reverse of this. Coke almost grows poetical when speaking of the beauties of good pleading; and, so long as it serves the grave and important office of limiting and defining the subject-matters of judicial investigation, a proper self-respect on the part of the profession should insist upon retaining so much of its original qualities as consist of good sense and sound logic.

2. Although I have not thought it necessary to speak at length of the powers and duties of the officers of the courts of equity, it seems proper to notice one class of these, as they constitute one of

the means by which such courts take testimony and settle facts in questions which come before them; and that is Masters in chancery. When such courts feel themselves incompetent to grant relief without some preliminary information, a reference of the matters is made to a master, who has power to procure such information for the purpose of satisfying the conscience of the court.¹ To this end, he is authorized to examine witnesses or the parties themselves; and, after a hearing upon the matters referred to him, he reports the results at which he arrives to the court.

I might also, if my limits allowed, speak of a mode of trying and determining issues, both of law and fact, which is not unfrequent, both at common law and under statutes of the States,—by submitting the same to the arbitration of judges, or, in popular phrase, referees, chosen by the parties.

Arbitrators thus chosen derive their authority from an oral or written agreement of the parties, or by appointment of the court in which an action is pending, under an order or what is called “a rule of court.” So courts of law have the right to appoint persons, under the name of auditors, to examine into matters of account which are in controversy between parties litigating suits involving questions of this kind. Such auditor hears the parties and their proofs, and reports to the court the items and amounts allowed by him; and these are assumed to be correct and true, unless the party objecting thereto can show the contrary. In the

¹ Bouv. Inst. § 375.

hearing before arbitrators and auditors, witnesses are examined in the same manner as in court; and questions of fact and law are argued by counsel, as in court.

There is a class of courts having cognizance of maritime affairs in the country, known as courts of admiralty, of which I should be glad to say something, if the subjects of which they have cognizance were not of a necessarily limited interest, inasmuch as they have little or no relation to the ordinary business of a country lawyer.

3. It is, nevertheless, desirable that you should become familiar with the character and jurisdiction of the courts of the United States, as well as of the States in which you are to reside respectively. But I do not propose to take up the subject any further than as it bears upon the mode of transferring actions which have been commenced in a State court to one of the United States.

In the first place, the forms of process and general course of proceedings are the same in both these classes of courts, there being the same distinction in both between civil and criminal matters, and those of law and equity. Admiralty proceedings form an exception, as they do not come under State cognizance in any form. Under the provisions of the Constitution of the United States, the State courts and those of the United States have concurrent jurisdiction of some matters, depending upon the status of the parties, whether citizens or otherwise. In the next place, it is a familiar principle, that when two inde-

pendent courts have jurisdiction of the same subject-matter, that which first gets cognizance of a case will hold it, to the exclusion of the other. There is a practical exception to this rule in the State and United States courts, in this, that in some cases it is in the power of a party against whom an action has been commenced and entered in a State court, to cause it to be removed to that of the United States, not by the way of appeal, or upon the idea that one is superior to the other, but by way of a compromise privilege under the Constitution, whereby certain classes of suitors may, at their election, have their actions tried in the one rather than the other.

With this exception, these courts are wholly independent of each other in their action ; and, while the State courts can in no case revise the doings of those of the United States, the same is true, with a very few exceptions, of a revision of the action of a State court by a United States court. The exceptions made by the law grow out of the right which is extended to foreign citizens — and to this extent citizens of one State resident therein are foreign as to the courts of other States — to have their causes tried in the courts of the United States. They may sue a citizen in the State courts where he resides or in those of the United States, at their election. So, if a foreign citizen is sued in a State court, he may suffer the action to proceed to trial and judgment, or, at his election, may remove it into a court of the United States. In the latter case, the jurisdiction of the State court is superseded, and every thing

proceeds as if the action had been originally commenced in the United States court. And the transfer, if made at all, must be done before the State court has taken any practical cognizance of the merits of the case.

The cases where the courts of the United States may revise the doings of those of a State are, as I have said, few and exceptional, and are limited to such as are expressly provided for by the Constitution of the United States, and the judiciary acts of Congress, where the purpose is to prevent collision between the jurisdictions of the State and Federal courts, and at the same time to maintain the integrity of the latter courts. Thus if, in rendering a judgment in a State court, the validity of a treaty or of a statute of the United States is called in question, and adjudged by such court to be invalid, or if the validity of a statute of a State is contested in a State court on the ground that it is repugnant to the Constitution, treaty, or statute of the United States, and the same is adjudged to be valid by the court of such State, the party in either of these cases against whom the decision has been rendered may remove the case to the Supreme Court of the United States, for their revision and action thereon. Among the memorable cases where the Supreme Court of the United States interposed to vacate and declare void the action of a State court, because it violated the Constitution of the United States, those of *Dartmouth College* and of *McCulloch v. Maryland* will occur to you, as well for their historic interest as for the magnitude of the questions they involved.

4. There is a process in which every American is interested, and of which every lawyer ought to know something, that I have only time to notice briefly. Indeed, so far as the forms of practice are concerned, no protracted notice is necessary. I allude to that of *Habeas corpus*. In one of its forms, it is in its very name historically associated with the protection which the law holds out to every citizen in the land, no matter how poor or humble and friendless he may be. In another form, it is a means of bringing witnesses into court to testify, who are so restrained of their liberty as to be unable to obey the ordinary *subpœna* by which witnesses are required to attend it.

The mode of suing out a writ of *habeas corpus* under the first form is by a petition, in which any one may be the petitioner, — the party in interest or any one in his behalf, — addressed to some proper court or magistrate authorized to issue such writ, by which he requires the officer or person who holds the party named in his custody, to bring him before some judge or court having cognizance of the matter; and such judge or court is required forthwith to inquire into the cause of his detention, and by what authority he is held. If no lawful or sufficient cause be shown, he is at once to be discharged; or, if he is lawfully held upon some charge which is bailable, he is to be admitted to bail. This inestimable privilege is guarded and secured to every citizen by the constitutions of the United States and the several States, while the mode of giving to it such effect is regulated by legislation.

In the other process of *habeas corpus*, if a person in custody of the law is required as a witness in any court, or before any magistrate, such court or magistrate may issue a precept to the officer having him in custody requiring him to be brought into court to testify; but it does not liberate him from the custody of such officer, and, upon his being discharged as a witness, he is returned to his original imprisonment.

As what I have been saying thus far has been intended for those who have made but a limited progress in their profession, I have purposely omitted several subjects of interest which will be likely to engage attention in a later stage of their course, as well as certain specialties of business to which a portion of the profession may devote their attention. Among those I might mention International law, which has, of late, been engaging much attention; and the law of patents, which is a pleasant and profitable department of legal practice for a limited number whose tastes lie in that direction. But there is one subject which I ought not to omit, although it may hardly be thought to come within the limits of professional practice; and that is constitutional law.

Every lawyer who pretends to a broad or liberal culture, ought to be at home in every thing which relates to the constitution of his own government. Especially is this true of our own country, where every citizen is theoretically cognizant of these matters. Not only is every lawyer a citizen, but he is something more. As a jurist he is at times called on to settle questions of law involving the

powers and limitations prescribed in the Constitution ; while as a citizen, trained and educated to influence and guide the opinions and judgments of others, he exerts a power in the community which may be sensibly felt in strengthening or impairing that respect for the Constitution among the people upon which it must ultimately rest for its principal support. I have already spoken of the power of public sentiment, under a government like ours, in moulding and shaping as well as in sustaining a people's laws. Now a constitution is but a law directly emanating from the people, and differs mainly from the action of a legislative body, with limited and delegated powers, in its being more fixed and elementary in its character. But, after all, it can at best do little more than prescribe the form and powers of the government which is to make, administer, and execute the laws which are to regulate the affairs of the State, and watch over the interests of the people, while it limits these powers, and defines, in general terms, the principles upon which these are to be administered.

But even here such is the imperfection of language, that much must necessarily be left to construction, as to what is granted or withheld by the Constitution as it is framed ; and questions have constantly been raised, ever since its adoption, some of which have been settled by adjudications of the courts, some by amendments to the original instrument, and some have been and still are open for discussion to a divided public opinion. We see this in the history of the great political parties which have at times directed the policy of the government.

Under a popular form of government, where the wish is often father of the thought, it is not difficult to build up theories as to the mode of administering it, which are radically diverse, if not wholly irreconcilable. Thus there have ever been two schools of construction as to our own Constitution, from the day it was published. By one of these the letter of the instrument is to be strictly adhered to and followed; and if a power claimed is not clearly "nominated in the bond," it is to be deemed a usurpation. The other, while it regards the Constitution as creating certain delegated powers, assumes that where any power is clearly declared in that instrument, there are thereby created, by implication, such incidental powers as are necessary to carry it into effect.

This diversity of views gave rise to questions which could not be settled by mere majorities in Congress, or local legislatures, but depended upon the action of the judiciary, and in the solution of which the services of the bar were put in requisition. Nor will the value of these services fail to be recognized, when we remember how much the great mind of Marshall was aided by the learning and ability of such men as Pinckney and Webster in giving character and consistency to an instrument upon the construction of which the permanence and capacity of our national government and the stability and efficiency of its administration were to depend.

Other questions of its construction have arisen, from time to time, since then, in some of which the life of the nation itself was involved. Had the

doctrine of State sovereignty, for which one section of our country contended, found favor with the bar and the courts of the North, as it did with those of the South, it would have needed no gift of prophecy to foresee that the so-called compact of the States was a mockery and a delusion. Instead of rising to the dignity of a bond of union for a great nation, it would have hardly reached that of an indenture of a feeble and unprofitable copartnership.

Fortunately for the country, and fortunately for the world, we had an honest and independent judiciary, sustained and encouraged by the learning and patriotism of an enlightened bar; and the rank and position which our nation holds to-day among the nations of the earth vindicate the wisdom and sagacity of those who framed the Constitution, as well as the learning and independence of the men who construed and applied it. It came from the hands of its framers imperfect and incomplete. It required wisdom and skill of unsurpassed ability and excellence to give harmonious action to its provisions. And the nation owes a debt of gratitude to the memory of John Marshall, for giving the elements of life and perpetual vigor to the Union of these States, hardly second to that which is due to Washington for having achieved its independence.

But strong as were the power and influence of that court, mighty as were the armies by which the government maintained its integrity, right as the administration in the end showed itself in the struggle in which it engaged, it is hardly dealing with conjecture to say that, had the power and influence

of the courts and bars of those States been thrown against the movement, it would have failed. The government, wanting the sustaining power of public sentiment, would have been powerless to maintain itself against a united South.

I have no other purpose in referring to discussions which have happily spent themselves than to remind you, as I have more than once attempted to do, of the magnitude of that responsibility which devolves upon men who, educated as you have been, take upon themselves the duty of guarding the rights and redressing the wrongs of others before the tribunals of the country, and indirectly reaching and controlling the judgments and opinions of their fellow-citizens in what concerns the policy and well-being of the nation. Upon this I have little fear of exaggeration, or being thought extravagant.

But perhaps you will ask, How is this to be done? Constitutional questions, you will say, are rarely raised for discussion in our courts; and when they are, they offer no chance for a young man to be heard in the discussion of them; and you may ask if you are to wait till you can get the ear of the Supreme Court before you can hope to do any thing to strengthen the hands of the government, and show your devotion to the country. My answer is in the fact that not one of a hundred of the questions of a more or less public interest which come before our courts ever find their way into those higher courts of general jurisdiction; while I remind you that questions are constantly being tried before the people of which no court takes cognizance, except so

far as public sentiment is everywhere felt, and in the decision of which lawyers have their full share of influence.

I might remind you, too, in how many forms of judicial investigation and inquiry, questions of constitutional power and limitation are raised in which counsel are heard, as well as the judgments of State and local courts made effective. It is in these ways that the sphere of the lawyer and of the citizen may become that of the politician without degenerating into the narrowness of party subserviency. And in view of the ease with which this mighty engine of public sentiment may be jostled out of its track, it is not arrogating too much for the profession to say that the lawyer who has made the science of the Constitution and political law a study is, if honest, a safer guide for the people to follow than one who acts as a political leader, and measures the value of an opinion by its bearing upon the ultimate success of his party.

6. But you will say, and with truth too, that in our country party runs into every thing, and every thing into party; and if a man would hope to guide the political opinions of others, he must identify himself with some party, and become a co-worker in its ranks. And you may go further, and ask if I am advising you, in what I have said, to throw yourselves into the troubled waters of politics, and enlist under the banner of a party.

Before I attempt to answer this inquiry, let me explain what I understand by politics and by party.

We start in our inquiry with the Constitution as one of the factors in working out the problem in what our government consists, and what are its powers and limitations. But when we come to the question how it should be administered, and in what manner it should be brought to bear upon the interests of the people, it resolves itself into one of measures about which men may reasonably differ, and which, in the end, must be settled by the judgment of the people.

In the theory of our Constitution, there are questions which the people are competent to settle and must settle in the last resort. The government in such cases becomes the organ and instrument of carrying out the judgment. And if those who exercise its functions refuse to carry this judgment into execution, the people, in justice to themselves, are bound to substitute others in their places who will do so. That, of course, is a mere secondary consideration; while to settle whether one or another of these measures or lines of policy shall be adopted, often demands the exercise of much wisdom, foresight, and political sagacity.

The greatest danger which the people have to fear is their own hasty and ill-advised judgment in matters of great and lasting import. They are not only in danger of being misled by impulse and passion, but of coming to unwise conclusions upon a superficial view of what the present moment holds out before them. It is for this reason that the masses who are withdrawn from opportunities to examine these questions for themselves, are in want of the

aid and counsel of those who are able to give time and attention to such investigations. And whoever will bring to these a fair mind and a diligent endeavor, and give to the public the honest results of an impartial inquiry, is a positive benefactor to his generation and his country.

If, then, I am right in these premises, politics are, in part at least, made up of questions of policy in respect to measures in which the government is to take a part. These may be more or less general in their nature; but, separately or collectively, they go to make up the politics of the country, in which the people feel that they have an interest, and, so far as they are able, are disposed to take a part.

I may illustrate this by two or three familiar examples, taken from the past history of our government. In the days of Washington's administration, the people were excited and took sides upon the measure of strict neutrality towards other nations while engaged in war, which was a distinguishing trait in the policy of the government. The same may be said of the policy of Mr. Jefferson in the acquisition of new territory, and of the war measures of Mr. Madison. Such have been the questions which have divided the country upon the protection of home industry and tariff. The bank question under the administration of General Jackson was another of those questions of policy, more or less national in its character, upon which the people divided and arranged themselves into parties with a view of shaping and controlling the action of the government. Regarding politics in this light, the

propriety, nay, more, the duty, of engaging in them by men of the profession, is no longer a question. The country has a right to their best thoughts, the best fruits of their learning and reflection, in creating and sustaining a sound national sentiment in the matter of politics, in the same way as society has to their influence and example in the matter of sound morals. Politics in this sense are but another name for statesmanship; and in his devotion to them the heart and brain of the lawyer ought to dictate to each other what he shall do.

But unfortunately there is another element of the subject, and one which is far more frequently associated, in thought as well as practice, with the word *politics*, than this broad and generous devotion of heart to questions of principle and policy which bear upon the peace and prosperity of the country. This arises from the necessity there is of employing agents and instrumentalities on the part of the government in administering its affairs. This involves the selecting those who are to administer the government in reference to the prevailing sentiment of the people. And so far as this is to be done by the direct action of the people, we cannot expect them to choose any other than favorites to fill the offices they have to bestow. And although this at times leads to miserable schemes of demagoguism, by which the people are misled and become the dupes of artful and unworthy men, it not unfrequently arises from the neglect of men who are the best able to judge of the fitness of candidates for the places, to attend the primary meetings where

the selections are made, or from their allowing their better judgment to be overruled by their aversion to engage in the work of enlightening the public mind, at the hazard of exciting controversy and ill-blood.

So far as they can, by their presence and appeals, influence the selection of good men for the offices which the people have to fill, the duty of lawyers, in connection with other intelligent and right-minded citizens, to take a part in these elections, is scarcely less imperative than it is to form their own judgments wisely, and act up to the dictates of an enlightened conscience. Up to this point, I repeat, you may and you ought to engage in politics. But there are thousands of offices whose duties are mechanical and ministerial; and in the selection of their incumbents the people have no interest beyond the fidelity and ability with which they perform their duties. Who shall fill these, ought not to be a question of party. Nor should it enter into the proper sphere of politics in the country. But so far have bad and selfish men degraded the character of our politics, that in some minds the very name is associated with petty scheming and cunning devices to promote the selfish ends of a party and its leaders; and the incumbents of offices, from the President to a tide-waiter, are made to feel that they owe an obedience to party which is paramount to conscience or to country.

Such politics as these strike a blow at every thing like independence of thought, and would crush out, if it were possible, all freedom of opinion. And if you ask me if a lawyer should lend himself to

politics in such a sense, I would answer, No, unless he shall have tried every thing else, and does it to keep his family out of the poor-house. What is the use of having learned to form opinions, if one does not express them, or act upon them? What is the use of culture or learning to one who is content with a round of mechanical formulas which require little more thought than turning a grindstone or tending a spinning-jenny?

Until the country can have spirit enough to discard that wretched dogma, that "to the victor belong the spoils," and work a radical reform in our civil service, I hold that man is to be pitied who has no higher aspirations than to feed on the crumbs that fall from the table of political power, while he is content to help work the wheels by which the machine of party is moved. And if any of you propose no higher use than this for the talents which God has given you, and which you have been cultivating here, I can only say, I fear you have been wasting your time to little profit or account. Mr. Choate, as Mr. Carpenter tells us, once "said, with an emphasis and an energy which thrilled me through and through, and which I shall never forget, 'Keep out of politics. Things have come to that pass when no man can mingle in American politics without sinking self-respect.'" And if by the term he means office-hunting, the tricks and petty schemes of party, I most cordially subscribe to the doctrine he maintains.

But I would, nevertheless, accept and hold office, if I could thereby take an active and efficient part

in making or administering the law, provided I did not thereby compromise my own self-respect, or my position or business at the bar. A man may go into the legislature of a State, and become a learner while he is acting as a law-maker; and, if he do not allow himself to be withdrawn from the proper duties of his profession, he may be benefiting both himself and others. So he may properly cherish an ambition for a seat in Congress; and, if an opportunity offers, the prize is not to be lightly thrust aside, provided it do not cost too much. But he ought not for a boon which, in the fluctuations of party and public favor, must necessarily be transient in its enjoyment, to jeopardize his ultimate success at the bar.

Before he accepts political office, let him make for himself a character and reputation as a lawyer, and, what is more, let him establish in himself the habits of thought and tastes and culture of a well-trained, self-reliant lawyer. If, before he has done this, he allows himself to be seduced by flattery from the life of circumscribed professional duty he has chosen into the stirring scenes of party, and the fascinations which beset one as a public man in the capital, it is rare that one feels content to go back to the hard work of his profession, and the irksome drudgery to which he must submit if he hopes to win success. Instead of that the chance is, as has happened to hundreds of others, that, after a brief period of enjoyment of the honors and patronage of place, he becomes a political mendicant, thankful for some clerkship or salaried agency, with the ever-present consciousness that he has had his share of the heritage, and spent

it like the prodigal of old, and must now live upon party charity.

Whereas, if he will first become his own master, and so train himself that he can go back to his profession and know that he can earn an honorable independence in that, let what changes may come in the political world, he may go into Congress, or any other post of honor, without fear of compromising his own dignity or independence. Such lawyers as these, when they can be had, are among the very best legislators in the country. But of all conditions in life I know few more to be deplored than that of a hopeful, ambitious young lawyer, who, conscious of good powers of mind, and with high aims at excellence, has suffered himself to be deluded into politics by the flattery of the press, or the applause of the caucus room, and has been left, after a few years of pleasant delirium, to look back upon opportunities wasted and hopes disappointed, by having given up a career where success had been certain.

But I will not pursue this train of thought any farther, since I know at what odds I am addressing you upon a subject upon which the imagination of a young man is so apt to get the better of his judgment. I would not say "put away ambition," but temper it with judgment, and guide it by wisdom; and in the game of life, never allow yourselves to stake personal independence against any thing which politics can promise.

7. Although I have spoken already somewhat at large of general as well as professional reading as a

means of culture and useful knowledge, I feel called upon to recur once more to the subject of books, from its importance in connection with your growth and progress as lawyers in the more advanced stages of your professional life. I have told you before that an admission to the bar is but entering a wider field of study. New subjects of interest are constantly presenting themselves, in the same way that new duties and spheres of action are opening before you. You cannot afford to give up the study of the law, nor can you afford to give your whole time to that alone.

The demands upon the profession are multiplying every year with the growth and expansion of knowledge and the advance of science; and to supply this demand the lawyer must read and study books. He must not only store his mind with learning: he must invigorate it by thought and reflection for action, and give to it the graces and amenities of literature and a cultivated taste. To this end he must make himself familiar with history; he must read works on political science; he must understand the laws of moral and intellectual philosophy, and know enough of the natural and exact sciences to sympathize intelligently with those to whom these are absorbing specialties. And with all these he must supply himself with the currency of literature for daily use from the novels and poetry and essays which the press is sending out into the world.

Now, you will say, to do half of these as thoroughly as a man ought to do would use up the whole of his time as well as exhaust all his powers, without

leaving any for the proper business and duties of life. My answer is, there is scarce any limit to what one may do by diligence and properly husbanding his time.

I do not say that one can read a tithe of the books that are being thrown upon the public; but he can at least select some of the best, and do much towards supplying the rest by periodicals and reviews, which, in these days, treat ably of almost every thing. By cultivating habits of general and miscellaneous reading, by keeping alive an interest in the new phases of science and intellectual thought, and drawing, as occasion calls, from the treasured stores of what you already possess, you will find yourselves happier men, your opinions more respected, and your learning and advocacy as lawyers more sought by others, just in proportion as you shall carry out into practical life these habits of gaining and using the knowledge which distinguishes the student and the man of the world. It is carrying into action that aphorism of Bacon that "reading makes the full man, writing the correct man, and speaking the ready man."

8. I have yet one hint to suggest by the way of caution, which relates to the spirit of progress and reform, that is the passion of the age. None are content with what they see around them. As they look back, they see that the world has been undergoing immense changes in the progress it has been making, and they associate the idea of progress with every change that is made, and look upon the over-

throw of old systems as reform. Many of these changes take place to adapt the condition of things in the community to the growing wants of trade and business, and the prevailing habits of thought among the people. And this remark applies with great force to the law itself. But while it must conform, more or less, to the changes that are going on in the usages in trade and business, and the habits of society, it is essentially conservative in its nature, and follows instead of leading social revolutions of any kind. In this way, it is an element of order and stability in a community, keeping it steady in its course, while making, in fact, an onward progress.

When, therefore, we see reformers trying to make sudden and essential changes in the rules and principles of law, which have stood the test of ages, and are still doing their work with efficiency and success, and are told that the law is to be thereby reformed, we need to be shown, in the first place, that there is an evil to be remedied, and then to be satisfied that the proposed change is the best way to work out this remedy, before we should be called upon to unite in the scheme with the zeal of new converts, because they give to it the name of reform. Because Brougham, with consummate research and ability, was able to detect and expose defects and abuses in the English law which had been growing up during centuries of its administration, only a very few of which had ever found their way into the jurisprudence of America, it does not, by any means, follow that every man, however learned or ingenious, can

frame a new system of courts and their procedure, which shall excel all that the wisdom and experience of past generations shall have devised. Even in England, the whole fabric of her jurisprudence did not require to be taken down and built up anew, because some of its timbers were found defective and decayed, and some of its passage-ways needed to be straightened and better lighted. So with the passion for reform which has sprung up in our own country: its fruits have yet to be tested before the wisdom of the changes it has wrought can be confidently asserted.

When another threescore volumes of reported cases, and half as many treatises, shall have simplified the code of practice of a neighboring State, and made it intelligible to the lawyer of ordinary capacity, the wisdom of substituting it for what had been in use a hundred years may become apparent to all. And the triumph over the experience of the past, which was achieved by another legislature in fusing six forms of action, which the merest tyro might have understood, into two, to bring the practice of the law more within the comprehension and capacity of the profession, will be more generally appreciated when its special advantages shall have been more fully developed.

On the other hand, I would not have you stand in the way of any real reform. There is an *old-foggism* in the law as in politics, which makes war upon every new measure, however salutary. But even this is less mischievous than that radicalism which goes for uprooting and subverting opinions

and institutions, merely because they have been suffered to stand long enough to bear the fruit for which they were planted; and, while it may be wise to try every thing, it is much more so to hold fast, whatever it may be, that which has been proved to be good.

9. Before closing these Lectures, which have grown altogether beyond what I anticipated when I began them, I have a word to say of the part which every one of you may take, as members of a hitherto honorable and honored profession, in giving power and character to the laws of the country, and in the influence you are to exert over the political as well as social well-being of the nation. In the first place, not only are lawyers, as practitioners, brought into the most intimate relations with the courts who construe and administer the law, but the judges of these courts are selected from the men who practise in them. In the next place, they constitute an influential part of Congress, as well as of every legislative body in the country. Then the columns of the press are open to them as a medium for reaching the public mind; and their discussions of questions in open court, in the presence of jurors, witnesses, and spectators, and the volumes of reported cases, which are accessible to all, help to excite in the community an interest in the general subject of the law, even among those who have no particular purposes to serve by making it a study. The more general this interest is, as a matter of thought and speculation, the more ready the people are to receive and practi-

cally adopt wise laws, and are the better able to understand the principles of sound legislation.

And what is more, the character, views, and habits of thought of different States and communities become assimilated in proportion as their laws become identical. Laws, like language, become a common bond to unite the people of different sections of a country in sympathy with each other, the more intimately the nearer its details are practically the same. Who is not conscious that there is a relation between New and Old England, other than that of a common language and a common descent,—the relation of a common law, by which the courts and leading members of the English bar are associated, in the mind of a Massachusetts lawyer, almost as intimately as those of our own country? And who does not feel assured that if the legislation of the various States as to land, business, civil procedure, and other great interests, could be assimilated into something like a homogeneous system, it would add an element of strength and a bond of harmony and union to our country and its nationality which cannot be supplied by any one of the instrumentalities of government? Nothing probably did more to draw a line of separation between the slave States and the free than the code by which the peculiar institution which distinguished them was maintained. Nor would it be easy to measure the extent of that influence which might be brought to bear upon the condition of the country itself, if the men who lead at the bar and guide in the halls of legislation could be educated upon the same broad and systematic

plan, and trained in the elements of a sound and liberal national policy.

10. If the influence of the bar may be felt in the character of the legislation of the country, how much more may it be, when considered in its connection with the scarcely less efficient department of the government, — the judiciary! In theory, this is withdrawn from the sphere of party politics, to stand an impartial umpire between the State and its citizens, and the arbiter of private rights.

To it the citizen looks for protection when his rights are invaded; and men in all conditions of life yield homage to its judgment. The secret of this power is not in the language of the Constitution that creates it, or that of any statute which it is called to administer, but in the wisdom and learning and firmness and purity of the judges who compose it, which win the confidence and command the respect of the community. Nor can there be a deeper wound inflicted upon a free government than that which a venal and corrupt court can inflict by its unjust judgments.

I need not remind you how intimate is the relation between the bench and bar, both in their constitution and conduct. A seat upon the bench is justly an object of honorable ambition on the part of a lawyer, and is one of the prizes which are held out to industry and good conduct in the profession. In the next place, the bench depends not a little, for its hold upon the public confidence, upon the diligence, learning, and good sense which the bar brings

to the discussion of those questions which engage the attention of the court.

The bar in this way stands between the bench and the public, to shield it from the popular agitations which disturb, at times, the quiet of the political world.

11. I come back, then, to the inquiry how the bar are to meet the demands upon them that grow out of the conservative position they hold between the popular and judicial elements of the government. Neither the bench nor the bar borrow any dignity from the *indicia* of office, or the traditional respect which is paid to birth or family. The wigs and robes of the English barristers were laid aside at the Revolution; and titles of rank and nobility were left behind when the Pilgrims came over to plant here a Christian commonwealth. And, as for birth and family, it is almost an obstacle in a young man's success, upon starting in his profession, that he does not need the pay he is earning to-day to help him support himself till to-morrow.

Every thing resolves itself into personal qualities, personal efforts, and personal character. Even when he has reached a position upon the bench, it brings him neither wealth nor leisure nor a sinecure. Its chief reward is that it is associated with the honor and respect that is due to merit. Even this is now to be held in many of the States upon the precarious tenure of a popular election.

Under the insane policy of a wretched radicalism, the highest judicial office is thrown with that of the

lowest hack of the party into the political shambles to be traded for and sold in the caucus room. The people at large, in the mean time, patiently look on and leave to others, who know better than they do, to look after the administration of the law, so long as it does not interfere with their immediate trade or business. It is upon the profession, therefore, that the trust devolves of preserving the law and its administration in its purity and integrity. Nor need we be at a loss to understand how this is to be done.

In the first place, they are to guard and maintain their own integrity, and to frown down every attempt to turn the noble calling of a lawyer into a mere medium of making money, or of winning political office. In the next place, they are to vindicate, as they have so often done, their claim to courage and devotion to right, in daring to sustain the cause of the innocent and the oppressed against injustice in every form, whether it be the cunning of the knave or the insolence of men in power.

They are, besides this, to keep alive that noble *esprit du corps* which regards an indignity or reproach cast upon the bar as a wound upon the personal honor of every member who deserves the name of lawyer. They are to feel that the good name which the English bar, as a whole, has sustained through that long course of revolutions and changes in the social and political condition of its people which the country has been passing through, has come down to them as a heritage, like the common law itself; which, like that, they are bound to transmit unsullied and unimpaired to future genera-

tions. And, as for you, if we have been true to our duty as teachers and our instincts as lawyers, you will need no incentives beyond your own good sense to carry out, in your conduct and your example, the lessons of the past and the teachings of the good and great men who have left behind them the record of useful and honorable lives.

12. I have but a single word to add to what, I fear, may have been a severe tax upon your indulgence. It has been my aim to offer such thoughts and suggestions of a personal character as I hoped might be of use to you when you shall have left these halls, and are thrown upon your own resources to overcome the difficulties and discouragements which lie in the way of so many when entering upon the duties of the profession.

What I have endeavored to say has had more reference to what is learned by experience and observation than from books; and I cannot but indulge the hope that when, hereafter, your thoughts recur to the scenes and associations in which you have listened to what has fallen from those who have sought to aid you in your progress, there will be pleasant memories in the retrospect, which will help to shed some rays of sunshine on the rugged path of law and duty which lies before you. And may I not hope, too, that you will, each of you, do something to sustain the dignity and vindicate the good name of a profession which is soon to welcome you to its honors and its rewards? Of that profession I have more than once spoken in my own language,

when paying to it the respect which has but strengthened with the better knowledge I have gained of those who have shown themselves worthy to be its types and representatives. Nor am I alone in bearing testimony to its claims upon your confidence. In the language of Sir John Davies, "How often would truth be concealed and suppressed, how oft would fraud be hid and undiscovered, how many times would wrong escape and pass unpunished, but for the wisdom and diligence of the professors of the law! Doth not this profession, every day, comfort such as are grieved, counsel such as are perplexed, relieve such as are circumvented, prevent the ruin of the improvident, take the prey out of the mouth of the oppressor, protect the orphan, the widow, and the stranger; in short, as Job speaketh, is she not 'legs to the lame and eyes to the blind'?"

If such a eulogium might be predicated of the profession you have chosen, while its functions and offices were principally confined to the protection of private rights and the advancement of justice between individuals, let me remind you that to these you are to add the broader responsibilities of citizens in giving force and direction to public sentiment as an engine of political power. The country needs your influence, and the government looks to you for support. Scattered as you will be through the length and breadth of the republic, these are to look to you to help reconcile conflicting interests and opinions, to soften local prejudices and jealousies, and to satisfy the people that the government under which they live is worthy of their

confidence and their veneration, and in that way to cherish a love of country and a pride of nationality which shall make us united at home and respected abroad.

To this high office and these noble duties you are to devote yourselves, if you would prove equal to the demands which the law makes upon such as are worthy to be its oracles. Under Providence, your destiny for failure or success is to be in no small measure in your own hands. If you will be true to the law, it will, in return, be true to you. The world will never cease to want just such men in our profession as you can make yourselves, if you will. The way to its high places is open to you all ; and these may be won by industry, honesty, and good conduct. These will not only win for you its honors, but, what is far better, the consciousness at last of a life well spent in the service of your country and your fellow-men.

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